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UNITED STATES DEPARTMENT OF AGRICULTURE

# AGRICULTURE DECISIONS

DECISIONS OF THE SECRETARY OF AGRICULTURE

UNDER THE  
REGULATORY LAWS ADMINISTERED IN THE  
UNITED STATES DEPARTMENT OF AGRICULTURE

(Including Court Decisions)



	<b>AGRICULTURE DECISION</b>
<b>IN</b>	<i>In re</i> Market Agencies at the Sioux City Stock Yards, p. 4.
<b>THIS</b>	<b>COURT DECISION</b>
<b>ISSUE</b>	Dairymen's League Cooperative Ass'n, Inc. v. Brannan, Secretary of Agriculture, p. 152.

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## PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered in the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial (as contrasted with quasi-legislative) character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for hearing have been given. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register. For reasons of policy, the identities of the parties are not reported in decisions issued under one statute which expressly authorizes, but does not require the publication of the facts and circumstances of a violation, unless the Secretary in his decision has specifically ordered or directed such publication.

The principal statutes concerned are the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 1946 ed. 601 *et seq.*), the Commodity Exchange Act (7 U. S. C. 1946 ed. 1 *et seq.*), the Grain Standards Act (7 U. S. C. 1946 ed. 71 *et seq.*), the Packers and Stockyards Act, 1921 (7 U. S. C. 1946 ed. 181 *et seq.*), and the Perishable Agricultural Commodities Act, 1930 (7 U. S. C. 1946 ed. 499a *et seq.*).

The decisions published are numbered serially, in the order in which they appear herein, as "Agriculture Decisions". They may be cited by giving the volume and page, for illustration, thus: 1 A. D. 472. It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D-578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in the Agriculture Decisions.

Current court decisions involving the regulatory laws administered by the Department will be published herein.

An Index-Digest and Subject-Index of the decisions reported and the court cases published herein will be found at end of each monthly issue, and the cumulative yearly Index-Digest, lists of decisions reported, statutes, orders, etc., construed, and statistical and other tables will be found at the end of No. 12 (December) issue of the Agriculture Decisions.

Copies of monthly issues beginning with January 1942 of the decisions will be available through the Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C.

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\*HISTORICAL NOTE.—The Secretary's decision in *In re Thatford Live Poultry, Inc.*, 1 A. D. 435, decided June 3, 1942, overruled prior decisions (Table of Decisions Overruled, 1 A. D. 819) as precedents because of lack of regulation requiring current assets to exceed current liability by at least 25 percent of average weekly purchases. Since that decision, regulation (9 CFR Cum. Supp. 201.14) setting up a standard of financial qualifications has been promulgated. *In re Albert Bree*, 3 A. D. 255 (1944).—Ed.



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**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**  
**AGRICULTURE DECISIONS**

(No. 2322)

*In re* VOGT'S DAIRIES, INC. AMA Doc. No. 27-88. Decided January 12, 1950.

**Dismissal—Consent of Parties**

Petition herein dismissed upon consent of parties.

*Mr. Edward L. Colc*, New York, New York, for petitioner. *Messrs. John G. Lebert and Julius G. Krause* for Production and Marketing Administration.

*Decision by Thomas J. Flavin, Judicial Officer*

**ORDER OF DISMISSAL**

This is a proceeding arising under Section 8c (15) (A) of the Agricultural Marketing Agreement Act of 1937. The petitioner having requested the dismissal of its petition and the respondent, the Production and Marketing Administration, United States Department of Agriculture, having consented thereto, the petition herein is dismissed.

(No. 2323)

*In re* ANCHOR SERVICE SALES. BAI Doc. No. 361-11. Decided January 6, 1950.

**Dismissal—Withdrawal of Petition**

Petitioner's request to withdraw its petition, granted.

*Brown, Douglas and Brown*, of St. Joseph, Missouri, for petitioner. *Mr. John Regan* for Bureau of Animal Industry. *Mr. Glen J. Gifford*, Presiding Officer,

*Decision by Thomas J. Flavin, Judicial Officer*

**ORDER GRANTING PERMISSION TO WITHDRAW PETITION**

This is a proceeding under the Act of August 24, 1935 (49 Stat. 781 *et seq.*, 7 U. S. C. Chapter 30), regulating the handling of anti-hog-cholera serum and hog-cholera virus. On July 18, 1949, the petitioner, Anchor Service Sales, St. Joseph, Missouri, filed a petition complaining of an action by the Control Agency administering BAI Order No. 361 (9 CFR, Part 131; 12 F. R. 5385), issued under the act. The

action complained of was the Control Agency's denial of petitioner's application for classification as a wholesaler. On December 21, 1949, petitioner asked permission to withdraw its petition. The respondent states that there are no objections to petitioner's request. Therefore, petitioner's request is granted and the petition is considered withdrawn.

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(No. 2324)

*In re* MISSISSIPPI VALLEY STOCKYARDS, INC., St. Louis, Missouri.  
P&S Doc. No. 1558. Denied January 17, 1950.

**Continuation of Rates and Charges**

Inasmuch as the parties are agreed, the provisions of the order of February 18, 1949, as modified by the order of June 14, 1949 are continued in effect to and including September 5, 1951.

*Mr. John J. Murray* for Livestock Branch, Production and Marketing Administration. *Mr. John C. Kappel, Jr.*, of St. Louis, Missouri, for respondent.

*Decision by Thomas J. Flavin, Judicial Officer*

**ORDER**

This is a rate proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*). The respondent is now operating under an order dated February 18, 1949 (8 A. D. 169), as modified by an order dated June 14, 1949 (8 A. D. 681) authorizing assessment of the current temporary rates to and including March 5, 1950.

On January 3, 1950, respondent filed a petition requesting that an order be entered extending the current authorization for a period of not less than 18 months.

On January 11, 1949, the Livestock Branch filed an answer recommending that the petition be granted.

Inasmuch as the parties are agreed the provisions of the order of February 18, 1949, as modified by the order of June 14, 1949, are continued in effect to and including September 5, 1951.

The schedule of rates presently in effect was authorized by the order of June 1, 1949. This order was preceded by a notice published in the Federal Register and an opportunity for all interested parties to be heard in the matter. No protest against the proposed action was received. This order merely continues the present rates in effect for an additional period of eighteen months. In view of the foregoing, it is found that notice and public procedure on the proposed rule are unnecessary.

This order shall become effective on March 6, 1950, and remain in effect for a period of eighteen months following that date.

The respondent shall continue to furnish the operating reports on a semi-annual basis.

Copies hereof shall be served upon the parties by registered mail or in person.

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(No. 2325)

*In re* ROBERT AIKINS. P&S Doc. No. 1855. Decided January 20, 1950.

**Cease and Desist—Unfair and Deceptive Practice**

Where a registered dealer appropriated to his own use grain left in pens assigned to commission men, it is held, that he wilfully engaged in a deceptive practice, but in the light of all the circumstances, cease and desist order is the appropriate sanction.

*Mr. John J. Murray* for Livestock Branch, Production and Marketing Administration. *Mr. Robert Aikins*, of St. Joseph, Missouri, *pro se*. *Mr. John J. Curry*, Hearing Examiner.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a disciplinary proceeding under the Packers and Stockyards Act 1921, as amended (7 U. S. C. 181 *et seq.*). It was initiated by an order of inquiry and notice of hearing, filed on October 21, 1949, which charged the respondent with appropriating to his own use certain feed from the troughs of pens assigned to other persons at the St. Joseph Stock Yards, St. Joseph, Missouri, in violation of Section 312 of the Act and the regulations issued pursuant to the Act. On November 15, 1949, the respondent filed an answer, the substance of which will be referred to later. On November 30, 1949, a report was filed by hearing examiner John J. Curry, recommending that the respondent be ordered to cease and desist from taking feed from other persons' pens without permission. The complainant, on December 6, 1949, filed exceptions to the examiner's report, urging that the respondent's registration should be suspended for a period of 10 days. The respondent did not file exceptions.

**FINDINGS OF FACT**

1. At all times material to this proceeding the respondent was registered with the Secretary of Agriculture as a dealer, to buy and sell cattle at the St. Joseph Stock Yards, St. Joseph, Missouri.



2. On or about September 27, 1949, the respondent, without authority, removed and appropriated to his own use certain quantities of feed from the troughs of pens assigned to other parties at the St. Joseph Stock Yards.

### CONCLUSIONS

The respondent in his answer stated, in justification of his actions, that the feed which he appropriated consisted of grain left in the cattle pens after the livestock had been fed; that this has been a long-standing practice at the yards, and that no one has ever before objected to his removing such leftover feed for his own use. Whatever may have been the practice in the past it is apparent, from the fact that a complaint has been filed, that objections have been raised to the respondent's actions. By taking and removing feed from pens assigned to others the respondent has engaged in an unfair and deceptive practice in violation of Section 312 of the Act (7 U. S. C. 213 (a)) and the regulations issued pursuant to the Act. Admittedly, what was done in the instance complained of was done intentionally and knowingly by the respondent, and was therefore wilful. See *In Re Tarr, Downs and Company*, 8 A. D. 517, 527 (1949), citing *St. Louis & S. F. R. v. United States*, 169 Fed. 69, 71. Upon the basis of the information presented and the explanation given by the respondent with regard to his actions, it is believed that the issuance of a cease and desist order will serve the purposes of the Act in this proceeding.

### ORDER

The respondent, Robert Aikins, St. Joseph Stock Yards, St. Joseph, Missouri, shall hereafter cease and desist from taking feed belonging to other persons at the St. Joseph Stock Yards unless specifically authorized to do so. A copy of this decision and order shall be served upon the parties, and except as to service this order shall become effective 15 days after service on the petitioner.

(No. 2326)

*In re* MARKET AGENCIES AT THE SIOUX CITY STOCK YARDS, SIOUX CITY, IOWA. P&S Doc. No. 308. Decided January 31, 1950.

### Cease and Desist—Demanding and Collecting Rates and Charges Other Than Prescribed Herein—Publication of Rates and Charges

Respondent market agencies are directed to cease and desist from demanding or collecting for any stock yard service rates or charges other than those set forth in Paragraph 36 hereof, and to publish and file with the Secretary of

Agriculture a schedule of such rates and charges to become effective on March 1, 1950.\*

### **Form of Reports To Be Made by Market Agencies**

Respondent market agencies are directed to continue to make reports to the Secretary of Agriculture in the same form as those which have heretofore been submitted, provided, however, that respondents and the administrative officials may devise and agree upon a new form of report and submit it for consideration and approval.\*

### **Bonds as Capital**

The face amount of bonds, furnished by respondents to assure payment of certain of their obligations is not considered as capital devoted to the market agency business upon which a return shall be allowed.\*

### **Accounts Receivable as Capital**

The amount of accounts receivable due the respondents is not to be considered in determining their working capital since the respondents' business is primarily of a cash nature and no sound reason is shown for allowing a return on that amount.\*

### **Determination of Working Capital**

A liberal allowance for working capital for the respondents is determined to be one-twelfth of their total annual operating expenses.\*

### **Determination of Rate of Return**

A reasonable rate of return on the capital invested by respondents in their business is determined to be  $7\frac{1}{2}\%$ .\*

### **Method of Rate Making—Unit Cost Method Followed**

The unit cost method of rate making for market agencies constructs rates upon the basis of an examination of actual unit costs experienced by several firms in connection with each species of livestock and in the light of operating conditions of the firms. The construction of rates in this manner is more likely to result in rates "reasonable" to the patrons and the firms than rates selected to return the aggregate revenues considered necessary to return the aggregate costs of rendering the services and, therefore, the unit cost method is followed.\*

### **Operating Expenses—Gifts and Donations**

Gifts and donations made by the respondents are classified as reasonable operating expenses of the respondents if such gifts and donations tend to improve the morale of workers or to promote employer-employee relationships, but those gifts and donations of a general nature which benefit the community in which the respondents live are excluded from reasonable operating expenses.\*

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

### Evidence—Reasonableness of Rates

On the basis of evidence introduced showing services performed by respondents and their methods and costs of operation, a schedule of rates is prescribed on a per head basis which will produce a margin over and above all per head costs found to be reasonable.\*

*Mr. Elmer J. Scott* for Livestock Branch, Production and Marketing Administration. *Messrs. Ashley Sellers and Jesse E. Baskette*, of McFarland and Sellers, Washington, D. C., and *Mr. Wiley E. Mayne*, of Sioux City, Iowa, for respondents. *Mr. John J. Curry*, Hearing Examiner.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

1. This is a rate proceeding under Title III of the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), initiated by a petition filed by the respondents on October 31, 1947, for a general modification of their rates and charges as hereinafter set forth. In their petition, the respondents requested that they be authorized to file a new schedule of rates and charges as set forth in Exhibit I of Appendix B of their petition and, in the alternative, that they be authorized to file a new schedule of rates and charges as set forth in Exhibit II of Appendix B of their petition. The essential difference between the two schedules of rates and charges proposed by the respondents is that the first is expressed in terms of maximum and minimum charges in combination with a percentage device which would cause an automatic adjustment in such rates and charges from time to time in accordance with the sales value of the livestock sold, while the second proposed schedule of rates and charges is expressed solely in terms of per-head charges without any device for automatic adjustment. In their petition, the respondents also asked that, pending final consideration of their petition, they be permitted to charge on and after January 1, 1948, the rates set forth in Exhibit I or Exhibit II of Appendix B of their petition, in the order of preference named, or, in the alternative, that, pending such final consideration, they may be permitted to continue to charge on and after January 1, 1948, the temporary rates and charges then in effect. The last mentioned relief was requested because an order was issued by the Judicial Officer of the Department on June 2, 1947 (6 A. D. 526), continuing in effect orders issued on December 31, 1946 (5 A. D. 893), and January 27, 1947 (6 A. D. 8), which orders provided for certain temporary rates and charges for the respondents for a period ending December 31, 1947. Under the terms of the then existing orders in this proceeding, the order of the Secretary

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

of July 25, 1931 (hereinafter called the "basic order"), prescribing rates and charges for the market agencies at the Sioux City Stock Yards, Sioux City, Iowa, and which had not been in effect since November 19, 1937, would have once more before effective on January 1, 1948.

2. On November 14, 1947, there was published in the Federal Register a notice of the petition for modification (12 F. R. 7603) in which the public was notified of the filing of the respondents' petition of October 31, 1947, and in which all interested persons were given an opportunity to be heard in the matter. No member of the public indicated a desire to be heard within the time prescribed in the said notice and on November 24, 1947, the Livestock Branch of the Production and Marketing Administration of the Department filed an answer to respondents' petition in which it was stated that, while there might be some merit to respondents' proposal with respect to a flexible method of fixing rates and charges, it was not prepared at that time to recommend that the request be granted or denied and in which it indicated it would file a complete reply at a later date. The Livestock Branch in its answer also requested that no action be taken with respect to respondents' request for an authorization to file a tariff corresponding to the tariff set forth in Exhibit I to Appendix B to respondents' petition. It also opposed respondents' alternative request for authorization to file at that time a tariff corresponding to the one identified as Exhibit II to Appendix B to the petition. However, it replied that, because of changed conditions, continued operation under the schedule of rates and charges then in effect might not produce per-head revenues sufficient to meet reasonable per-head costs and a reasonable per-head profit. Accordingly, the Livestock Branch recommended that respondents be authorized, effective January 1, 1948, and to and including the effective date of an order making final disposition of respondents' petition, to put into effect a schedule of rates and charges embodying all charges provided for in Exhibit II to Appendix B to the respondents' petition of October 31, 1947, other than selling charges and embodying the selling charges set forth in the answer of the Livestock Branch. The Livestock Branch also recommended that, during the period of the effectiveness of the temporary rates and charges recommended to become effective January 1, 1948, respondents should continue to furnish quarterly reports as required by orders then in effect.

3. Thereafter, on November 25, 1947, the respondents replied to the answer of the Livestock Branch, waiving objection to the Livestock Branch's postponement of a filing of a complete answer to the respondents' petition of October 31, 1947, and stating that they did not oppose the recommendation of the Livestock Branch as to the schedule of rates and charges to become effective January 1, 1948, and the proposal of

the Livestock Branch with respect to the filing of the quarterly reports. However, the respondents expressly stipulated that they did not, by such reply, admit the reasonableness of the rates and charges to become effective January 1, 1948, and that the respondents reserved the right to file a petition for such interim relief as the circumstances might require.

4. On December 1, 1947, the Judicial Officer entered an order (6 A. D. 1139) in which respondents were authorized to file a schedule of rates and charges corresponding to the rates and charges set forth in the notice published in the Federal Register on November 14, 1947, except that the selling charges were authorized to be those set forth in the order of the Judicial Officer (the schedule of charges authorized by the Judicial Officer was the same as the schedule recommended in the answer of the Livestock Branch filed November 24, 1947). In his order, the Judicial Officer also directed that respondent should continue to file the quarterly reports required by previous orders in the proceeding. The authorization contained in the order of the Judicial Officer was declared therein to be effective on January 1, 1948, and to remain in effect until further order. Thereafter, the respondents, in accordance with the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), and the regulations thereunder, filed a schedule of rates and charges in accordance with the authorization contained in the order of the Judicial Officer. The respondents operated under this order until after the hearing described hereinafter. Following that hearing, respondents, upon request, were allowed to charge the rates suggested by the Branch in its proposed order by an order of the Judicial Officer entered on December 10, 1948 (7 A. D. 1184).

5. On January 15, 1948, the Livestock Branch of the Production and Marketing Administration filed a supplemental answer to the petition of the respondents of October 31, 1947. This supplemental answer was filed because in its answer of November 24, 1947, the Livestock Branch had deferred the filing of a complete answer in order to give it time to study further the proposal of the respondents, and the respondents had agreed to the postponement of the filing of a complete answer in their reply of November 25, 1947, to the answer filed November 24, 1947. In its supplemental answer, the Livestock Branch alleged that the basic order of July 25, 1931, had not been contested and that the rates therein set forth had been put into effect and have remained in effect, except that supplementary orders issued from time to time have permitted increased rates to be charged for temporary periods of time only without any determination having been made of the reasonableness of such temporary rates. The Livestock Branch also alleged in its supplemental answer that the schedule of rates and charges set forth in

Exhibit I of Appendix B to respondents' petition, which embodied, in part, a percentage feature, posed novel questions and problems which could only be answered after a full hearing on the proposal, and that it was unable, in the absence of such a hearing, to approve or disapprove such a rate structure. Accordingly, it denied the "material allegations of respondents' petition in support of such rate structure." The Livestock Branch also denied that the rates and charges proposed by respondents on a headage basis were reasonable and alleged, affirmatively, that such rates were unreasonable. It conceded that "conditions and factors which influence and determine the reasonableness and nondiscriminatory nature of rates for respondents have changed since the original order of July 25, 1931." However, it alleged that it was impossible to assess the cumulative effect of all such changes on reasonable rates and charges for respondents without a full presentation of all relevant evidence at a formal hearing. It concluded its supplemental answer by requesting that the petition of respondents be set down for oral hearing to afford the respondents an opportunity to prove the material allegations of their petition, to justify the reasonableness of either or both the rate schedules proposed by them, and to demonstrate the unreasonableness and discriminatory nature of their present rates and charges.

6. John J. Curry, Office of Hearing Examiners of the United States Department of Agriculture, was designated as the examiner to preside over this proceeding, and on March 3, 1948, he notified the parties that an oral hearing would be held on April 19, 1948, in the United States Post Office Building at Sioux City, Iowa, at which time and place all interested parties would have an opportunity to appear and present such evidence as might be relevant and material. Thereafter, on March 18, 1948, the examiner notified the parties that the hearing originally set for April 19, 1948, would be held on April 26, 1948, at the same location named in the original notice of hearing. The Judicial Officer thereafter notified (13 F. R. 1903) the public and all interested persons that a hearing would be held on April 26, 1948, at the United States Post Office Building in Sioux City, Iowa, to receive evidence with respect to the respondents' petition filed on October 31, 1947, notice of which had been published in the Federal Register (12 F. R. 7603).

7. (a) An oral hearing was held in Sioux City, Iowa, in the United States Post Office Building, beginning on April 26, 1948, and continuing through May 13, 1948, at which all interested persons, including the Livestock Branch of the Production and Marketing Administration, were given an opportunity to present evidence relevant to the respondents' petition and bearing on the question of what constitutes reasonable rates and charges for the respondents to the end that just, reason-

able, and nondiscriminatory rates might be prescribed by the Judicial Officer. Ashley Sellers and Jesse E. Baskette of the firm of McFarland and Sellers, Attorneys at Law, Washington, D. C., and Wiley E. Mayne, Attorney at Law, Sioux City, Iowa, appeared for the respondents. Elmer J. Scott, attorney, Office of the Solicitor, United States Department of Agriculture, appeared for the Government. The transcript of evidence consists of 15 volumes containing 2067 pages of oral testimony. The respondents called 28 witnesses and the Livestock Branch called 9 witnesses. The respondents introduced 50 exhibits, while the Livestock Branch introduced 32 exhibits. In addition, the examiner announced that the prior proceedings in this docket (P&S Docket No. 308) would, under the act and regulations, be considered a part of the record. In addition, at the request of counsel for the Livestock Branch, the examiner announced that official notice would be taken of the following matters (Tr. 1420, 1727-1729) :

The posting of the Sioux City Stockyards.

The registration of each respondent as a market agency.

The present tariff of the stockyards company at Sioux City, Iowa.

The tariffs of the market agencies operating at the following posted stockyards:

St. Paul, Minnesota  
Chicago, Illinois  
St. Louis, Missouri  
St. Joseph, Missouri  
Denver, Colorado  
Billings, Montana

The quarterly reports of the respondents for the years 1943 to date.

The tariffs of the following 20 posted auction markets: Alliance, Nebraska; Atkinson, Nebraska; Bassett, Nebraska; Belle Fourche, South Dakota; Billings, Montana; Butte, Nebraska; Bozeman, Montana; Chadron, Nebraska; Cherokee, Iowa; Crawford, Nebraska; Fremont, Nebraska; Great Falls, Montana; Gordon, Nebraska; Norfolk, Nebraska; O'Neill, Nebraska; Rapid City, South Dakota; Watertown, South Dakota; Webster City, Iowa; the Anderson Auction at Yankton, South Dakota; and the Slaughter Auction at Yankton, South Dakota.

The tariffs of other posted auction markets that are generally within the Sioux City trade territory.

(b) At the oral hearing, the respondents introduced comprehensive documentary and oral evidence, including evidence respecting general economic conditions affecting their methods of operation, and also presented complete information with respect to the costs incurred by them in doing business and with respect to the operation and reason-

ableness of the alternative tariffs proposed by them in their petition of October 31, 1947, and with respect to the unreasonableness of the rates and charges authorized by the basic order of July 25, 1931, and of the rates and charges in effect by virtue of temporary orders. At the hearing the respondents called 28 witnesses including representative patrons of respondents. The Livestock Branch called 9 witnesses. A list of the witnesses appears in paragraph 7 of the Tentative Order and will not be repeated here.

(c) The respondents and the Livestock Branch stipulated (Tr. 187) that 12 of the 25 respondents now actively engaged in the conduct of a livestock commission business (hereinafter sometimes called "agencies", "market agencies", "commission merchants", or "commission firms") at the Sioux City, Iowa, stockyards would be selected for the purpose of making cost and other studies, including the determination of reasonable rates, and that the conclusions reached with respect to these 12 respondent firms as a result of such studies would be considered as typical and representative of the entire 25 firms now actively engaged in business at Sioux City. Under the stipulation, however, both parties were at liberty to offer evidence respecting the operations of any of the respondents in addition to the 12 firms selected as typical. The respondents and the Livestock Branch did make cost studies of the 12 respondent firms selected as typical, but the respondents, in addition, presented complete cost studies and other data with respect to all 25 of the respondent firms now actively doing business, and the Livestock Branch also presented some data with respect to other respondents than the 12 selected as typical and representative. The result of this stipulation is that the questions of the justness, reasonableness, and discriminatory character of the rates and charges which are now in effect by virtue of temporary orders or which would become effective if the basic order of July 25, 1931, should again become operative, and of the alternative schedules of rates and charges proposed by the respondents are to be tested by the conclusions reached, in part, from a study of the 12 typical and representative firms. The 12 firms referred to are as follows:

Carpenter Commission Company  
Hudson-Coe Commission Company  
Mid-West Livestock Commission Company  
Farmers Union Livestock Commission  
Long & Hansen Commission Company  
Steel-Siman and Company  
John Clay & Company  
Rice Brothers



Wagner, Garrison, and Abbott  
Lee Livestock Commission Company  
Frank E. Scott Commission Company  
Ingwersen Brothers

(d) At the conclusion of the hearing, the examiner called the attention of the parties to the rules of practice which permit the filing of proposed findings of fact, conclusions, and orders, and briefs, based upon the record in the proceeding. The time stipulated for the filing of such documents was 60 days from the date of notification to the parties by the Hearing Clerk that the transcript had been filed with the Hearing Clerk. On June 3, 1948, the Hearing Clerk notified the parties that the delivery of the transcript of the oral hearing in this proceeding was completed on June 2, 1948, so that the parties had until August 2, 1948, to file suggested findings, conclusions, orders and briefs. The examiner subsequently extended this date to August 16, 1948. On November 2, 1948, the examiner's report was issued entitled "Tentative Findings of Fact, Conclusions, and Order." Respondents asked for and received an extension of time for the filing of exceptions until February 1, 1949. Respondents filed detailed and extensive exceptions filling 189 pages of legal-size paper. The Livestock Branch also filed some exceptions. Oral argument upon the exceptions were held before the Judicial Officer in Washington, D. C., on March 15 and 16, 1949.

8. Due to the discussion in the Findings of Fact and Conclusions, as hereinafter set out, it is not necessary to outline the evidence here. On some matters we have combined in one place a discussion and analysis of the evidence and on other matters we have outlined first the evidence on one side and later the evidence on the other side before proceeding to make findings and conclusions thereon. Except as specifically noted, the facts stated herein are based on undisputed evidence and constitute findings. Where there is a dispute in the record as to facts, it will be noted and findings made thereon. The following Findings of Fact and Conclusions are based upon the entire record in this proceeding, including the matters heretofore mentioned of which the examiner announced that official notice would be taken.

## FINDINGS OF FACT AND CONCLUSIONS

### I. Prior Proceedings

9. The Sioux City Stock Yards, Sioux City, Iowa, was posted under the Packers and Stockyards Act of 1921, as amended (7 U. S. C. 181 *et seq.*), in the fall of 1921, and thereafter the market agencies or commission merchants operating at the stockyard became amenable

to the provisions of the act, among other things, with respect to the charging of just, reasonable, and nondiscriminatory rates and charges and with respect to the filing of tariffs embodying such rates with the Secretary of Agriculture. On March 7, 1930, the Secretary of Agriculture issued an Order of Inquiry and Notice of Hearing in which the Secretary directed that an inquiry be made into the reasonableness and lawfulness of all rates and charges provided by the aforementioned tariffs of the livestock commission merchants at the Sioux City Stock Yards. Pursuant to such Order and Notice of Inquiry, a hearing was held at Sioux City, Iowa. Upon the basis of the hearing and after consideration of the briefs and oral argument, the Acting Secretary of Agriculture made his Findings of Fact, Conclusions, and Order with respect to the rates and charges of Sioux City on July 25, 1931. By such order, the livestock commission merchants operating at Sioux City Stock Yards were directed, within a prescribed time, to cease and desist from demanding or collecting for any stockyard service "the rate or charge shown therefor in the schedule of rates and charges now on file with the Secretary of Agriculture." It was further ordered that within a prescribed time the commission merchants involved should not publish, demand, or collect any rate or charge for the furnishing of any stockyard service in excess of the rate or charge determined by the Secretary in his order to be just, reasonable, and nondiscriminatory for the furnishing of such service. The commission merchants were also directed, within a prescribed time, to file with the Secretary of Agriculture a schedule showing all rates and charges for the services furnished by them at the Sioux City Stock Yards and all rules and regulations changing, affecting, or determining such rates or charges, and it was directed that no such rate or charge should be in excess of the rate or charge determined by the Secretary to be just, reasonable, and nondiscriminatory. In Paragraph 87 of the basic order of July 25, 1931, the Secretary set forth what he determined to be just, reasonable, and nondiscriminatory rates.

10. The order of July 25, 1931, has continued to be operative except to the extent that its provisions have been superseded from time to time for temporary periods by supplemental orders issued, generally, in accordance with stipulations entered into after informal negotiations between the respondents and the agency of the Secretary of Agriculture which has been immediately responsible for the administration of the act. The respondents, as alleged in their petition filed October 21, 1947, have been operating under temporary tariffs since November 1937. Under the pattern of rate regulation followed by the aforementioned orders, the respondents were not, and are not, able to change their rates and charges except after the filing of a formal

petition, the consideration of which must follow the procedure set forth in the applicable laws and regulations.

## **II. Respondents' Methods of Doing Business**

### **General**

11. The livestock market at Sioux City, Iowa, is one of the basic and primary livestock markets of the country. At this market livestock consisting of cattle, calves, sheep, hogs, horses, and mules are bought and sold. The facilities of the market place comprehend a complex organization in which definite functions are performed by the stockyard company which owns and operates the stockyard; the commission merchants or market agencies engaged in buying and selling livestock at the stockyard on a commission basis; the dealers who also buy and sell livestock for speculative purposes at the stockyard; the various classes of packer and order buyers; the Sioux City Livestock Exchange which performs certain services for the respondents and for the patrons of the stockyard; and the representatives of the Government who are stationed at the Sioux City Stock Yards, such as the market supervisor who assists in the administration of the Packers and Stockyards Act, the inspectors of the Bureau of Animal Industry of the Department whose function is to detect disease in the livestock, and the news specialists whose function is to gather and disseminate useful information relative to market conditions. In addition to the foregoing, there are facilities at the market place provided by insurance companies, railroad companies, telegraph and telephone companies, and other companies engaged in the furnishing of services essential to the operation of the market.

12. Although they are not part of the stockyard proper, various meat-packing companies operate slaughtering plants adjacent to the stockyard. At the present time, Armour & Company, Cudahy Packing Company, and Swift & Company operate such plants in the area adjoining the stockyard. In addition, there are four local packing companies in the stockyard area: Epstein Packing Company, Sioux City Packing Company, Smith Packing Company, and T. & W. Packing Company.

### **The origin and development of the market place**

13. On January 21, 1884, the Union Stockyards Company was organized to operate a stockyard at Sioux City, Iowa. This company erected an Exchange building, side tracks, pens, and made general improvements, and it also erected two packing plants. In 1891 it took over the organization known as the Central Stockyards Company which was located on a part of the site of the present stockyard. The Union Stockyards Company became insolvent shortly thereafter

and on April 28, 1894, the Sioux City Stock Yards Company, the present operator of the stockyard, was organized and purchased the entire holdings of the Union Stockyards Company.

14. The Sioux City stockyard has enjoyed a steady growth in business throughout its history. In 1888, its first full year of operation, it received 5,564 cattle, 8,568 hogs and 239 sheep. In 1947 it received 1,463,435 cattle, 67,211 calves, 1,783,149 hogs, 784,069 sheep, and 4,173 horses and mules. Respondents' Exhibit 4 shows by graphs the total receipts of sheep arriving at the Sioux City market for the years 1930 to 1947, inclusive. Respondents' Exhibit 5 shows the same information with respect to receipts of cattle and calves, and respondents' Exhibit 6 shows the same information with respect to hogs. From studying the graphs in the exhibits, it will be seen that there have been fluctuations from year to year during this period in the receipt of the various species. The fluctuations in the receipt of sheep and hogs appear to be more substantial than those with respect to the receipt of cattle and calves. These graphs show that when 1947 is compared with 1930 there has been a sharp upsurge in cattle and calf receipts and a fall in sheep and hog receipts, although during the war period of 1941 to 1945 a sharp increase in sheep and hog receipts also took place.

#### The volume of business handled

15. Through witness Rodeen, traffic manager of the Sioux City Stock Yards Company, there was presented in evidence respondents' Exhibit (19-A) which shows the salable receipts, the direct receipts to packers, through-billed receipts, and total receipts of livestock at the Sioux City stockyard from the years 1930 to 1947, inclusive. From this exhibit is obtained the following summary of total receipts, by years, for this period:

Year	Hogs	Cattle	Calves	Sheep
1930.....	2,316,982	774,462	82,072	1,187,952
1931.....	2,645,613	768,923	82,379	1,278,808
1932.....	1,955,317	545,243	48,598	776,156
1933.....	2,296,901	773,687	55,911	857,407
1934.....	2,067,160	1,183,698	222,014	1,166,811
1935.....	850,257	736,275	65,697	967,001
1936.....	1,382,343	912,253	82,401	843,031
1937.....	827,170	636,965	63,478	580,643
1938.....	1,036,943	658,047	54,152	660,713
1939.....	1,203,437	672,599	60,199	710,963
1940.....	1,709,589	734,789	62,285	785,632
1941.....	1,398,583	872,809	58,148	778,832
1942.....	1,620,336	1,005,661	65,746	1,087,564
1943.....	2,228,049	1,161,561	48,246	1,361,301
1944.....	2,485,982	1,241,637	86,516	1,365,284
1945.....	1,354,879	1,444,081	83,642	1,104,222
1946.....	1,750,404	1,447,794	98,632	917,193
1947.....	1,783,149	1,463,435	67,211	784,069
	30,912,064	17,034,179	1,387,327	17,213,592

From the foregoing exhibit, the following comparisons of 1930 and 1947 are noted:

Year	Salable receipts			
	Hogs	Cattle	Calves	Sheep
1930.....	2, 277, 099	765, 057	76, 897	1, 172, 385
1947.....	1, 518, 126	1, 383, 767	56, 049	556, 919
Year	Direct receipts to packers			
	Hogs	Cattle	Calves	Sheep
1930.....	6, 605	863	-----	8, 131
1947.....	211, 785	9, 103	926	92, 030
Year	Through-billed receipts			
	Hogs	Cattle	Calves	Sheep
1930.....	33, 278	8, 542	5, 175	17, 436
1947.....	63, 238	70, 565	10, 236	135, 120

The foregoing table shows that there has been a decided change in the character of the receipts received at the Sioux City stockyard between 1930 and the present. In the case of salable receipts, there has been a decline in the case of hogs, calves and sheep and an increase in the case of cattle. When direct receipts to packers are considered, the exhibit shows that there has been a tremendous increase in the case of hogs, cattle and sheep. The data respecting through-billed receipts show that there has been an increase in receipts in the case of all species. This change in the character of the receipts is an indication of important adjustments in operations at the stockyard which have taken place since 1930.

16. One very important factor with respect to the character of the volume of receipts is the emergence, since 1930, of truck arrivals as the predominant mode of arrival. At the hearing held in 1930 preceding the issuance of the basic order of July 25, 1931, the tendency of a change-over from rail arrivals to truck arrivals was indicated. Respondents' Exhibit 9 shows conclusively that truck arrivals predominate today. In 1947 truck arrivals of cattle were 78.2 percent of the total receipts as compared with 39 percent in 1930. In the case of calves 30.9 percent of the total arrivals in 1930 were by truck, whereas in 1947, 36.7 percent of such arrivals were by truck. In the case of hogs, the arrivals by truck in 1930 were 71.7 percent and 90 percent in 1947. Truck sheep receipts advanced from 24.5 percent in 1930 to 55.4 percent in 1947.

#### **The origin of the livestock handled**

17. The livestock arriving at the Sioux City stockyard in 1947 was received from livestock producers and feeders in 26 states of the United

States, and shipments were forwarded from the market to 44 states in the United States and the Dominion of Canada by the packer-buyers, order buyers and dealers operating at Sioux City.

#### **The trade territory**

18. Because of the location of other central livestock markets, slaughtering plants, railroad lines, auction markets, and other factors, a large number of the states from which livestock is received annually at the Sioux City market is not a part of the natural trade territory from which the Sioux City market can reasonably expect regular shipments of livestock. Respondents' Exhibit 8 is a map showing the area from which the Sioux City market can reasonably expect livestock receipts and the area from which it receives the major part of its business. The natural trade territory of the Sioux City market, as indicated by the vertical lines on the map, comprises an elliptical-shaped area extending generally westward from Sioux City. It covers the northwest part of Iowa, the southwest corner of Minnesota, the north half of Nebraska, all of South Dakota, the southwestern part of North Dakota, all of Wyoming, and part of Montana, Idaho, Nevada, Iowa, and Colorado. Within this natural trade territory, from which the Sioux City market reasonably expects to receive regular consignments, is a local area, indicated by the cross lines on the map from which the market derives the major part of its business.

#### **General conditions affecting operations at the market place**

19. The emergence of the truck as a means of transportation, as pointed out above, has served to revolutionize methods of transporting livestock to and from the central livestock markets. This development of the truck as a predominant mode of transportation has caused other important changes in methods of operation.

20. The advent of the truck as a means of transporting livestock to market has brought about increased competition to the central public markets from other forms of livestock markets. The central public markets were originally established at the converging points of several railroads, thereby providing the livestock producer in the area with a market readily accessible to him. Packers established slaughtering plants at these points because they could obtain large supplies of livestock to operate their plants at maximum efficiency. With the advent of the truck, many crossroads become a market place, as livestock can be hauled by truck from any direction. This has given rise to the establishment of auction sales, packer concentration points and interior packing plants throughout the Nation as well as in the Sioux City trade territory. Most of this development has taken place since 1930. Respondents' Exhibit 1 graphically illustrates the present situation existing with respect to the Sioux City market. In this ex-

hibit there is shown the location of a large number of posted auction livestock markets, non-posted auction livestock markets, packer concentration points, packing plants, and other competing central public livestock markets. Inasmuch as the number of auction markets increased substantially from the year 1930, the central livestock markets, including Sioux City, no longer enjoy a monopoly of livestock receipts. The exhibit also shows that the Sioux City market is located in the same general area of the country as four other nearby central public markets, namely, Omaha, Sioux Falls, Fargo, and South St. Paul. In addition to the packing plants located at the central public markets, there are six packing plants located at six other cities in Minnesota, thirteen other cities in Iowa, five other cities in South Dakota, one other city in Nebraska, and two cities in Montana. There are six other posted markets in Iowa, six other posted markets in South Dakota, two posted markets in Wyoming, and five posted markets in Montana. There are also seventeen packer concentration points in Minnesota. Numerous non-posted markets are also located in this area, as follows: Minnesota, 57; Iowa, 142; North Dakota, 26; South Dakota, 45; Nebraska, 82; Montana, 7; and Wyoming, 10.

21. With the advent of the truck and the improvement of all classes of highways and country side roads since the year 1930, feeder buyers no longer have to buy their annual feeding requirements of livestock at one time or ship them in cars for sale at the expiration of the feeding period. Today, livestock feeders attend the market week after week throughout the year purchasing a truckload or several truckloads of livestock to replace that which they have brought to market. They are also able to market a few head or a truckload of livestock at a time.

22. In the early days of the industry small lots of livestock were assembled by local buyers or shipping associations and forwarded to the market in carload lots. In the case of shipping associations where the carload was of mixed ownership, the association's manager marked each separate owner's consignment and forwarded instructions to the commission firm at the market showing how each shipper's livestock were marked or branded, and the entire carload was consigned to one commission firm. Such consignments by a shipper in less than carload lots were relatively easy to handle because the entire shipment was usually consigned to one firm, and generally well marked for sorting so that no special problems were encountered. Since such carload shipments moved according to railroad time schedules, this made it easier to handle such shipments upon arrival. The truck has changed the conditions just mentioned. Local buyers have largely been eliminated, except those buyers employed by, or shipping direct to, packing

plants. Furthermore, the use of the truck has increased the number of multiple ownership consignments but, at the same time, has decreased the average number of head per consignment. Today, the average number of cattle per owner arriving by truck is approximately seven head per shipment. Truck shipments are seldom adequately marked, and sorting must be performed on the basis of the description furnished by the trucker. A large percentage of truckloads are not only of multiple ownership but contain consignments to two or more commission firms. All of these factors have increased the amount of work which must be performed by the stockyards and the commission firms. Trucks arrive unannounced at all times of the day and night so that the stockyard and commission firms must provide facilities to take care of arrivals at all hours. Between 60 and 70 percent of truck arrivals are during the night and prior to six o'clock in the morning. They frequently arrive at the market in large numbers at approximately the same time.

23. The stockyard and the commission merchants have been faced with the problem of converting more or less obsolete facilities to meet the changes brought about by the advent of the truck. These changes in facilities and services are essential for the rendition of stockyard services.

24. The advent of the truck has changed to a material degree the marketing practices of livestock producers and feeders. Formerly, stocker and feeder livestock produced on the western ranges were marketed during a short period during the fall of the year, at which time corn-belt livestock feeders purchased their annual requirements in carload lots. Many of the cattle marketed from western ranges were grass-fat steers, and very few calves or yearlings were sold as a regular practice. Market information was extremely limited and very frequently cattle were shipped to the market upon very meager information as to price trends. Radio was still a novelty and no serious attempt had been made to disseminate detailed market information by classes day by day and, in fact, hour by hour such as now prevails.

25. Livestock shippers today demand greater service from commission firms and the stockyard than they demanded years ago. A substantial number of livestock shippers are college-trained and conduct their operations as any other business man. They are in a position to know more about the product which they handle and are perhaps more critical when they do not receive proper stockyard services. Representative patrons of respondents testified that they expected and demanded more service today than ever before and were willing to pay for it, if necessary, at increased rates. A number of such witnesses



testified, also, that the services presently rendered by the respondents are adequate and satisfactory. All witnesses testified that whatever rates were prescribed, they should be reasonable rates.

26. Numerous witnesses testified that the stockyard company and the commission merchants at Sioux City have not been able to attract experienced educated young men to enter the business in sufficient numbers during the past 20 years. Witnesses testifying for the stockyard company and the commission merchants stated that the latter have not been able to hold all the personnel which they have been able to attract. R. L. Lisle, the Government market supervisor at the Sioux City stockyard, testified that the market agencies were having difficulty in acquiring necessary personnel to maintain their businesses and to take care of normal replacements. He stated that the market agencies have been compelled in recent years to employ relatively untrained personnel. He also testified that he thought it was necessary for the market agencies to provide for a stabilized long-range personnel recruitment program. Respondents' Exhibit 23 contains information respecting the owners and managers of the market agencies at Sioux City. This exhibit shows that very few men have entered the business as owner or manager within the past generation. There is no pool from which managers or owners may be drawn. Respondents' Exhibit 25 shows that the number of owners of market agencies are 51, that their average age is 53.4 years, and that their average years of service are 31. A number of witnesses testified that competitive lines of endeavor afforded better opportunities than the market agency business with respect to hiring personnel. Some witnesses testified that the Secretary's method of associating a certain salary with a fixed performance had the effect, whether intended or not, of limiting the amount that the market agencies could expend for salaries.

27. The operations of the commission merchants have been adversely affected by the development of direct packer buying. Direct receipts of livestock have greatly increased since 1930 and the effect of this has made it necessary for the market agencies to give better service in order to maintain their relative position. The market at Sioux City has become an order buying market due largely to the use of the truck as a predominant mode of transportation. This has brought about an increased specialization in different types of order buyers. Most of the packers, for example, have steer buyers, yearling buyers, cow buyers, bull buyers, and calf buyers. In 1930 there was no such intense specialization. To cope with this situation, the market agencies have found it necessary to train salesmen for each of the classifications in which there is a packer buyer. Similarly, it has been necessary to develop specialists to handle specialized order buyers. Order buyers

are those who purchase livestock on a commission basis for large and independent packers located throughout the country.

28. The foregoing development has made it necessary for the market agencies to give more attention to sorting livestock than ever before. It is necessary for them to know the type of livestock which each class of buyers will probably want and then sort the consignments so as to fit the needs of each class of buyers. Respondents take pains to sort in such manner as to obtain the highest possible price for consigned livestock.

#### **The facilities of the market place**

29. The operating facilities of the stockyard have been continuously enlarged, improved and modernized to keep pace with the growth in livestock receipts. As a result, the market agencies operating at the stockyard have to make longer drives with their livestock and more labor is needed to handle the receipts.

30. The Sioux City Stock Yards was posted as a public stockyard under the Packers and Stockyards Act in the fall of 1921. The stockyard company limits itself to the operation of the stockyard, namely, receiving and yarding livestock, delivery of feed, weighing of livestock, and incidental services in connection therewith such as cleaning, shearing, dipping, disposal of cripples and deads, and other matters.

31. In 1933 the stockyard company had devoted to the rendition of stockyard service 3,088,543 square feet of land. In 1945, this was increased to 3,574,695 square feet.

32. Respondents' Exhibit 10 contains a map showing the physical facilities comprising the stockyard as of the present date. Rail borne livestock is delivered at the stockyard by the six line-haul rail carriers serving Sioux City by means of the Sioux City Terminal Railway Company. Pens and other facilities of the stockyard are assigned to the different commission firms upon the basis of volume insofar as this is possible. Similarly, pens and facilities are assigned to dealers operating at the stockyard. In approximately the center of the stockyard is located the Exchange Building in which the stockyard company and the commission firms and others have their offices. No charge, as such, is made to commission firms for the use of the general facilities of the stockyard company. However, a rental charge is made for offices in the Exchange Building.

33. The charges due from the shipper to the stockyard company for services performed are deducted from the proceeds of sale by the commission agency handling the particular transaction and are remitted to the stockyard company. With respect to salable receipts, these livestock are first received by the employees of the stockyard company, either from the rail or the truck carrier, and they are there-

after turned over to the employees or other agents of the commission firms to which they are consigned. The latter have full custody of and responsibility for the livestock until the sale is made and the weighing takes place. Then the employees of the stockyard company once more assume responsibility for and control over the livestock and take charge of the out-bound shipments and such operations as may be incidental thereto.

**The commission firms located at the market**

34. There are 25 commission firms actively engaged in the performance of buying and selling livestock at the Sioux City market on a commission basis. These commission firms also do some buying for feeders when requested to do so. The sale of shippers' livestock may be made to packer-buyers, order buyers, dealers, or directly to feeders located in the corn-belt area. The commission firms act as agent for the shipper. They furnish skilled and specialized personal services in connection with the sale and purchase of livestock. They use very little tangible property in their operations.

35. The work of the market agencies centers around the selling and buying of cattle, sheep and hogs. A certain market agency may confine its activities to selling, and another may confine its activities to buying, but in most cases they do both with selling being the predominant type of work (Tr. 236). Some of the market agencies handle more of one species of livestock than another, tending to specialize in a given species or in a given classification of a given species. After receiving the livestock from the stockyard company, the market agencies have the duty of classifying the livestock and sorting it for ownership and grade for the best possible trade (Tr. 236). Feed is furnished by the stockyard company, but the feeding is done by employees of the market agencies (Tr. 236). After the market agency has performed its function of selling the livestock at the highest possible price for the owner, the livestock is weighed under the supervision of the market agency by stockyard weighmasters and, at that time, custody is returned to the stockyard company which has the responsibility for moving the livestock out of the yard to its proper destination. The market agencies, as agents for the owners, and the different types of buyers come together under conditions of intense competition and deal with each other at arm's length in the strictest sense. It is the conflict between these sellers and buyers—the one seeking to obtain as much as possible for the livestock and the other seeking to pay as little as possible—that sets the market value of livestock. The market value thus set is a yardstick which is used throughout this area by other buyers and sellers who consummate

their transactions at places other than the Sioux City market. Numerous shippers to the market testified that their knowledge of the daily prices of sales at Sioux City, gained by way of the daily radio program broadcast from the stockyard under sponsorship of the market agencies and the stockyard interests, enable them to decide not only whether to make a shipment to the Sioux City market at that time but also whether to transact business out in the territory in which they were located with assurance that they have accurate information as to the price.

36. Ordinarily the typical market agency located at the Sioux City stockyard is divided into an office force and a yard force. The actual receipt, custody, sale, and other handling of the livestock is the responsibility of the yard force, but the making of a proper accounting to reflect such handling is the responsibility of the office. The yard force of a market agency is ordinarily divided into departments representing the three major species, cattle, hogs and sheep. In the yard force are salesmen, yard men, tab men, and other employees necessary to the proper handling of the livestock. In the office are the administrative personnel, the bookkeepers, the employees charged with the furnishing of market news information, and others.

37. The daily work of the market agencies must be performed quickly and accurately, since thousands of head of livestock move in and out from day to day, and the livestock on hand must be quickly sold and the proceeds accounted for before the process is repeated the next day. The sales are made each day during market hours which are from 9:00 a. m. to 3:00 p. m. Each morning employees of the respective departments of the yard force arrive long before the market opens to get the livestock which arrived overnight ready for the day's selling. During these early morning hours, the yard employees of the market agencies take custody of all the livestock which has been consigned to their respective firms and get them ready for selling by sorting them for ownership and otherwise grading and classifying them in such a manner as the salesman thinks will make them bring the best price in the light of current market value of the particular grades and classifications of the species. The sorting and grading is very important. The efficiency with which this is done is directly reflected in the price obtained. The salesman acquaints himself with the latest information available as to prices before the market opens every morning. By the time the market does open, the salesman has his livestock ready for inspection by the buyers. Ordinarily, the buyers come into the pens to look over the offerings of a particular salesman. It is here that the bargaining takes place upon which de-

pends the return to be made to the patron. The degree of difficulty in disposing of livestock on a particular day will depend upon the market demand for livestock at that time. Sometimes the buyer is more anxious to purchase than at others. A good salesman is able to detect the degree of anxiety of a particular buyer to purchase. Once the sale is made, the livestock is driven to the scales where it is weighed by employees of the stockyard company and turned over to such company for further handling. While in its custody, the market agency feeds the cattle in accordance with the instructions of the shipper. All cattle arriving at the Sioux City stockyard by truck at night between 6 p. m. and 6 a. m. are handled by the Lyman Ease Night Yard Service Company which, under a contract with the different market agencies, takes custody of the livestock so arriving from the stockyard company and yards them in the pens assigned to the commission firm to which they are consigned. The Ease Company also waters and feeds the cattle in accordance with instructions which have been given by the shipper. In this way, shrinkage is reduced to a minimum, and the cattle are able to present the best possible appearance when the market opens the morning following arrival.

38. From the time the livestock are received at the stockyard and turned over to a particular market agency, a written account is kept of the movement and the handling of all livestock. Following the weighing and the recording of the data incident to that operation, these records are turned over to the office of the market agency for the purpose of making an account of the sale by the office force, which account of sale, together with a check for the total sales value less marketing costs, is mailed to the shipper before the close of the day (Tr. 241). Under the rules in force at the market, payment for all livestock sold on the market during a given day must be made before 10 o'clock the next morning through the clearing house of the Exchange. Proceeds of these sales are deposited by each market agency in its custodial account for shippers' proceeds, which accounts are kept separate and apart from all other funds handled by the market agency (Tr. 241). In rendering the account of sale and remitting to the shipper, the market agency deducts its own commission charges from the total sales proceeds and it also deducts and transmits to the stockyard company such charges as are due that company under its tariffs with respect to the particular consignment. Other charges permitted to be deducted, such as brand inspection fees, are also deducted by the market agency and turned over to the proper recipient (Tr. 241-242). The method of operation varies somewhat depending upon the species involved and these variations will be set forth in the following paragraphs.

**Sheep**

39. The handling of sheep by the market agencies illustrates the degree of care and skill which must be exercised in the adequate performance of their work for the benefit of the patrons. M. A. Sack of Sioux City, Iowa, the manager of John Clay & Company, one of the respondents, gave detailed evidence as to the method of handling sheep (Tr. 466, 479, 611-637). Based upon the evidence given by this witness and other evidence in the record, the following facts are found with respect to sheep.

**General**

40. Sheep and lambs consigned to the respondent market agencies arrive at Sioux City either by rail or truck. In the case of rail shipments, the stockyard company unloads the animals from the cars and delivers them to the pens of the market agency to which they are consigned (Tr. 468). After a selling agency gives a receipt to the stockyard company for the consignment, the former is responsible to the consignor for the proper handling, feeding, watering, selling, and accounting. A consignment by rail may consist of either a single deck or a double deck car, or several cars belonging to either one or more owners. Regardless of the number of owners, a shipment or consignment may consist of one kind of sheep or lambs or it may be made up of both sheep and lambs and a number of different kinds, classes, and ages (Tr. 469).

**Sorting for ownership**

41. When more than one owner's sheep or lambs are included in a shipment, sorting for ownership is necessary. The marks of identification may be ear marks, chalk marks, paint, or some other means of distinguishing one owner's stock from another's. Even these marks are indistinct and sorting for ownership becomes a procedure that requires a great deal of skill which is gained through years of training and experience. It also requires the expenditure of considerable time and physical labor. Generally speaking, the marks of identification on sheep and lambs originating in the territory surrounding the market are fresher and, therefore, more distinct than those on sheep and lambs arriving from the western range country since the marks on the latter are usually older and tend to become obliterated as the animal grows older. In cases where a sorting chute is used, it is necessary to look over each lot carefully after the cut has been made to determine if any errors occurred. Corrections are made by "legging them out", which means catching a sheep or lamb by the leg and dragging it from one pen to another. When sorting smaller lots, the legging system is used almost entirely. The amount of physical

effort is much greater but time is generally saved due to the fact that sheep are slow to move through a sorting chute, especially when tired (Tr. 469, 470).

#### **Sorting for market classes**

42. Sorting for market classes differs a great deal from sorting for brands although, after determining the different classes included in a shipment, the procedure is practically the same. At the present time, the Department of Agriculture quotes prices on 13 different kinds and grades of sheep and lambs, including 4 grades of fat woolled lambs, 3 of fat shorn lambs, 2 of fat ewes, and 1 of feeding lambs. Breeding stock, aged wether, various grades of sheep-feeding lambs, and possibly other classes are not quoted by the Department. The market agencies sort the lambs into all of these various classes, and more besides, which are not included in the Department's classification. When handling a shipment of lambs in which both fats and feeders are included, it is customary to crowd the lambs into close quarters so that each individual lamb can be handled, which is the only way to determine if they are fat. Either the fats or the feeders are marked with chalk. After the marking has been completed, the cutting can be done through the sorting chute (Tr. 470, 471).

#### **Sorting feeders for uniformity and weight**

43. Only a capable judge of sheep is qualified to do the grading. A period of training under a competent sheep man will enable an employee to develop to the point where the marking of fat lambs is entrusted to him. After the fat lambs are taken from the feeders, it is necessary to sort the feeders for uniformity in regard to weight and quality. This may involve several more cuts or sorts. It is necessary to handle a consignment of sheep several times before they are ready to be shown to the buyers.

#### **Mixed shipments**

44. Grading is complicated in the case of mixed shipments of lambs and sheep. Moreover, when ewes and wethers are included in a shipment, it is necessary to catch and mouth many of them in order to determine their age. Wethers and ewes are sold separately since they command different prices. Yearling wethers and aged wethers are never sold together for the same reason. Ewes for breeding purposes are generally sold according to age. Killer ewes are graded for quality and flesh.

#### **Truck shipments**

45. Truck shipments are not delivered to the selling pens of the market agencies by the stockyard company as in the case of rail ship-

ments, but are yarded in pens adjacent to the unloading chutes (Tr. 472). From these pens, each agency is obliged to receive and drive their consignments to their pens. Truck consignments are fed and watered as are all rail shipments. Selling agencies determine the consignments intended for them by duplicate dock slips furnished by the stockyard company at the unloading chutes. At this point, the representatives of the market agency also must examine the truckers' slips to determine whether or not their shipments contain plural ownership and, if so, to ascertain the number and markings of each lot. Truck shipments do not necessarily mean small consignments. Often a number equivalent to a double-deck rail car is received from one consignor. On the average, truck shipments do mean smaller units with plural ownership. This does not lessen the amount of labor and skill required to sort and shape the stock for selling. (Tr. 471-472).

#### **The sheep salesman**

46. The foregoing findings relate to the preparation of the sheep and lambs for sale. The actual selling is performed by a skilled specialist. Generally a salesman supervises the work of sorting and shaping up his consignments for the market, in many cases doing a large part of the work. At any rate, he must thoroughly understand the kind of stock he has on hand and the market price which he desires therefor before entering the selling pens with a buyer. In addition to knowing sheep as he sees them in the selling pens, the sheep salesman must be adept in trading and possess a background judgment and training that will enable him to make sound decisions. He must be well informed relative to prices prevailing at competitive markets, the dressed trade, and also the wool market, which are factors that help the packers decide what they want and what they will pay for their supplies. Each owner's stock is sold on its merits. The salesman endeavors to secure as much as possible for his offerings. He deals with highly trained packer and order buyers. Generally, it is necessary for the salesman to trade with more than one buyer before completely selling out his pens. The sheep salesman generally sells all classes and grades of sheep, while there are cases in which the packers have special buyers for certain classes. After a salesman's duties are completed in the yards, he must correspond with those consignors who did not accompany their livestock to market and be prepared to assist in the office in the preparation of accounts of sale and with respect to other matters. There is no way in which a good sheep salesman can be acquired over night. He must gain his ability and knowledge through years of experience.



**Weighing**

47. After a sale has been completed, the animals are weighed by employees of the stockyard company, under supervision of the market agencies, after having been driven to the scales by employees of the latter. Sheep and lambs are weighed in drafts for ownership according to buyers.

**Caring for feeders**

48. Frequently, one class out of a consignment may be sold, leaving feeding lambs unsold, in which case it is necessary for the selling agency to carry them over in other pens from day to day to wait for country buyers or some one else who can use them since there are no yard traders dealing in feeder lambs. Lambs carried over in this manner must be fed and watered, and also, in the disposition of these lambs, it is frequently necessary for the selling agency to canvass various prospective farmer buyers.

**Dipping and shearing**

49. It may be necessary to dip and shear the animals included in a sale to outside buyers before they leave the yards. The selling agency attends to this work and often assumes the responsibility of disposing of the wool to the local wool buyer. The salesman must be well versed in the wool trade. No compensation is specifically included in the rates and charges for this service.

**Filling orders for feeders and breeders**

50. Filling orders for feeders and breeders is a service rendered by the market agencies to farmers and feeders. It requires personnel as skilled as those involved in selling. Sorting, in order to obtain the proper kind, is practically the same as when sorting to sell.

**Office work**

51. After the selling and weighing or the buying of the sheep or lambs have been completed, the office work becomes important. It includes the computation of scale tickets, billing the purchaser, accounting and remitting to the consignor, and, of course, speed and accuracy are essential. In cases of plural ownership a separate account of sale is rendered for each owner. This involves the proration of expenses and the preparation of separate checks.

52. Witness Johnson, the office manager of one of the respondents, testified with respect to the office work of the market agencies at Sioux City (Tr. 637-669). In cases where the market agency has purchased sheep instead of selling them, the buyer for whom the commission firm acts as agency is rendered an account of purchase. The commission firm transmits a check to the seller for whom it acted, along with an account of sale, and also a bill to the purchaser before the close of the

business day upon which the sale took place. The purchase price is paid through the clearing house maintained by the Sioux City Livestock Exchange before ten o'clock the following morning.

### Hogs

53. *General*.—Witness Bergeson (Tr. 811 *et seq.*) and Witness Brown (Tr. 690 *et seq.*) testified with respect to the detailed operations involved in handling hogs bought and sold on the Sioux City market by the market agencies. When hogs arrive by rail or by truck, they are yarded in pens by the stockyard company and these pens are, in all cases, those which are most convenient to the unloading chutes and where the hogs can be yarded with the least trouble. Early in the morning it is the duty of an employee of the market agency to check the yardage of the receiving pens so that he may identify the hogs which have arrived during the previous afternoon or night. Such employee determines which hogs are consigned to his firm. He then goes to the key man, or delivery man, of the stockyard company and the latter unlocks the pen and verifies the number of hogs consigned to the particular market agency. The market agency representative next signs a receipt for the hogs, at which time the market agency assumes responsibility until the weighing process is completed when responsibility in this regard is shifted to the stockyard company once more. The market agency yardmen keep an accurate record of each consignment as to number, color, and identification of the hogs.

54. *Sorting*.—Hogs are usually first sorted for ownership, that is, in the case of plural ownership in a consignment, each owner's hogs are sorted off and penned separately. Hogs are then sorted by classes to be presented for sale. Sorting of hogs has become much more complicated in recent years (Tr. 815). Formerly, practically all receipts arrived by rail, and carloads were sold as units without sorting for grades. At the present time, buying is much more specialized and buyers have become more particular. This has made it necessary for the market agencies to sort stags, sows, and butchers in separate classes and weights in order to realize the highest net return to the patron. The patrons have come to rely heavily upon this service. This sorting and grading service is of a highly specialized and personalized nature. The closer livestock is sorted and graded the more the patron will receive for it. The market agencies keep apprised of the type of livestock kept by particular shippers and, in addition, through experience, they have acquired a knowledge of what the different buyers want (Tr. 816). Witness Epperson (Tr. 252, 273) testified that his firm keeps a card index of the type of livestock in the feedlots of their patrons so that they are able to fill the needs of buyers at a given time. They gain this data through their appraisal work. The increase in

multiple ownerships in consignments since 1930 has increased the work of sorting because, in addition to the type of sorting just mentioned, they must be sorted for ownership as well.

55. *The hog salesman.*—Experience and adaptability are prerequisites to becoming a successful hog salesman who must have considerable natural ability. The hog salesman usually starts work about 6:30 a. m. He goes to the office and lists the yardage of each consignment of hogs, as indicated by the records made by the stockyard company on the unloading chute ticket which is turned over to the commission firm. These tickets show all consignments to the respective commission firms during the course of one night. The salesman then checks each consignment with the trucker's hauling ticket and ownership is noted on consignments having plural ownership (Tr. 697–698). The truckers either describe the animals belonging to each owner or mark the animals with hairclips or some other distinguishing marks. The salesman then goes into the yard and assists the yardman in moving the hogs and feeding and watering them. After this, the sorting takes place and the hogs are made ready for the market.

56. *Selling hogs.*—When the market is opened, the salesman begins to show his hogs. During the progress of trading, the salesman must be in constant touch with information as to prices at other markets. He must try to determine the orders for each packer buyer on the local market. He must determine if the orders first issued to the buyer appear to be reasonable, or if there is a chance that the buyer may receive better orders later in the trading day. He must also learn how trading is going on in other divisions in the hog house. He must determine the capacity of the order buyer, that is, whether the latter has orders for a large number of hogs or is looking only for a small number. As soon as the pulse of the market is felt, he is able to make a quick decision as to "when to unload." The nature of the function performed by the hog salesman makes it necessary that he obtain the foregoing information in a casual manner, since a good salesman considers it imprudent to convey to the buyer any sense of nervousness over market developments. Likewise, the buyer conceals from the salesman his exact needs and intentions as much as possible. A good salesman, after trading with specific buyers for some time, learns to detect signs which denote how a particular operator is thinking, and this knowledge becomes part of the ability of a particular salesman. Only experience can develop such an individual. The salesman must frequently, in addition to keeping posted on the market as described above, spend considerable time in discussing with an owner of the livestock the progress of the trading. Many shippers are sensitive of their treatment in the alley, in some cases actually hindering the salesman

from consummating a sale to the shipper's own advantage. One witness testified that it is impossible to secure a good salesman from another market to any advantage (Tr. 701). The experience of the market agencies at Sioux City discloses that the best way to develop a hog salesman is to take a man from the Sioux City market and train him in that work.

57. *Weighing*.—After hogs are sold, the salesman assists in weighing which, as in the case of sheep and cattle, is performed at scales operated by stockyard company employees. When the weighing is completed, the selling price and owner's name is marked on a scale ticket. When all the hogs are weighed, a general check of the alley is made and the salesman then turns the records kept by him over to his office for the purpose of making accounts of sale. After the accounts of sale are prepared, the salesman prepares letters to the patrons, making comments relative to the sales and market conditions.

58. A man in charge of the hog alleys must see that the pens are clean and that such care is given to the hogs as will enable them to get the best possible fill for the producer. The hog yardman must see that the hogs get all the corn they will need from time to time and all the water they will drink, and he must be particularly zealous to see that the hogs will go to the scale at a time when they will reflect the greatest fill. Live-stock is a perishable product. Hogs cannot be put on a shelf from day to day and allowed to remain there until some buyer comes along and purchases them. If possible, the consignment must be sold on the day it arrives. The yardman usually starts to work about six o'clock in the morning, and his first duty is to find out where each consignment of hogs which arrived during the night was yarded by the stockyard company. He then goes to the holding pens in the truck division and signs for the hogs, that is, he gives the stockyard company employee a signed receipt for each consignment. The yardman, assisted by the salesman, then moves each consignment to the commission firm's assigned pens, at which point the hogs are fed and watered. He then assists the salesman in the sorting work and, after the market opens, the hog yardman makes a periodic check at the truck chutes in order to receive any late arrivals and to move them up to the commission firm's alley so that the salesman may sell them. The hog yardman also keeps account of the scale turn and checks with the salesman on the hogs sold so that they may be properly lined up for weighing. He also circulates around the yards, checking bulletins from other markets, talks with salesmen in other divisions and, in general, keeps his eyes and ears open for developments relative to market trends. He reports such information to the salesman, who uses the data in making sales. The yardman drives the hogs on the scales and calls out to the weighmaster the

purchaser's name. After each lot is driven off the scale, the yardman checks the head count given the weighmaster to make sure that the man counting at the scale has the same number as that on the yardman's tape. He then assists the salesman in making the hog tickets. After weighing, he cleans and gets his alleys in shape for the next day's business, at which time he counts and signs for the feed delivered by the stockyard company and stored in the corn bunks in the commission firm alleys.

59. *Buying stock hogs*.—The commission firms at the Sioux City market also purchase for their patrons stock hogs for future feeding. It takes a skilled buyer to purchase stock hogs that are suitable to go into the country as feeders.

60. *Office work*.—After the performance of the operations in the yards with respect to the physical handling and selling of the hogs, the office force of the market agency must render the usual accounts of sale or accounts of purchase and make remittances and collections in accordance with the general office practices prevailing among the market agencies at Sioux City.

#### Cattle

61. *General*.—A number of witnesses testified with reference to the handling of cattle (including calves) by the market agencies. Among these were witness Heldridge (Tr. 671 *et seq.*) and witness Powers (Tr. 630 *et seq.*). Other witnesses testified with respect to the general problem of handling cattle. Insofar as cattle are concerned, the Sioux City market is today primarily an order-buying market. During 1947, shipments were made to 44 different states. Prime beef usually goes to either the eastern or western seaboard, cow beef goes to the north or other industrial sections, light weight half fats are freely purchased by chain stores, and this is particularly true with respect to the southern states. There are a large number of different market classes of cattle. Cattle arriving at the market must be sold to buyers according to their particular tastes and requirements. Both slaughter and feeder cattle are sold upon the Sioux City market. The slaughter cattle is usually sold to packers or to order buyers for packers and the feeder cattle is sold to farmers, who take them to feed lots, fatten them, and thereafter market them—in a great many cases the subsequent sale being made by the market agency which purchased them as feeder cattle for the farmer. Some of the slaughter cattle arriving at this market may be considered as dual-purpose cattle, that is, the grass-fed cattle may be in some instances suitable either for immediate slaughter or for shipping to a feed lot within the corn belt territory.

62. *Truck arrivals*.—Slaughter cattle arriving by truck constitute the largest portion of cattle arrivals today. Such arrivals have grown tremendously since 1930 and such growth, with accompanying de-

velopments, has increased the services which it is necessary for a market agency to perform. Truck consignments arriving at the yard are first unloaded by employees of the stockyard company at the unloading chutes where they are yarded in available pens. At this time, the trucker gives the stockyard company employee the name of the consignor and the name of the commission firm to which the cattle are consigned. This information is written on a dock chute ticket by a stockyard company employee. A copy of this is given to the trucker at the time of unloading. When the cattle are yarded in holding pens by the stockyard company employee, the yardage is written on the same chute ticket as that given to the trucker. A copy of this ticket is filed away in a small ticket box allotted to each commission firm by the stockyard company. If the consignment of cattle arrives at night, the Lyman Ease Night Yard Service signs for the cattle and, after noting the original yardage of the cattle from the chute ticket, the cattle are unlocked by the stockyard company and turned over to the night yard service man. He, in turn, drives the cattle to the holding pens of the particular agency to which they are consigned. If the holding pens of that agency are full, the night yard service man yards the cattle in the nearest available empty pens. In addition to driving the cattle to the proper pens, the night yard service man consolidates consignments by owners, and feeds, waters, and beds down the cattle in an appropriate manner. The responsibility of the market agencies for the cattle attaches from the time they are delivered to the night service man or from the time they are delivered to the employees of the market agency. In the case of day arrivals by truck, the employees of the market agencies to which they are consigned take custody of them from the stockyard company at the holding pens adjacent to the unloading chutes in which they are yarded. The night yard service organization is paid a sum each month by the various market agencies, but this charge is not passed back to the shipper. Every morning, representatives of the market agencies determine whether all the cattle consigned to them have been moved by the night yard service into their proper pens. Where such consignments have not been so moved, they are moved by the employees of the market agencies. Also, at that time, any crippled or dead animals are noted and hauled away.

63. *Sorting*.—After the animals are delivered to the holding pens of the particular market agency to which they are consigned, it is necessary to sort the animals for ownership and for grade. What has heretofore been said with reference to the particular skill of the market agencies in sorting sheep and hogs applies also to cattle. The practice of sorting, in the case of cattle, differs considerably from that which was in vogue in 1930. As in the case of other species, the de-

velopment of sorting of cattle has been necessary to meet the demands of established order buyers on the market. In 1930, packer buyers purchased most of the slaughter cattle which arrived, but today order buyers are an extremely potent factor in the purchase of such slaughter cattle which they purchase on a commission basis for independent packers located throughout the country. Also, at the present time, most of the packers have steer buyers, yearling buyers, cow buyers, and calf buyers. In 1930, there was no such intense specialization. The increase in multiple ownership since 1930 has increased the work involved in sorting cattle. The sorting is performed by the salesman, assisted by the yardman.

64. *Size of truck shipments.*—In 1930 there was still a large volume of rail business. The truck delivery of cattle was confined to small trucks which, in most instances, hauled the cattle of one owner. Today, however, most of the slaughter cattle arrive by truck and the size of the trucks has increased (Tr. 835). There are frequently six to ten owners of one consignment. In the past, shippers waited until they had a load ready and then shipped either by truck or rail. Today, they ship the cattle when they are ready, regardless of the number of head.

65. *Other modes of arrival.*—In addition to the truck arrivals of slaughter cattle, slaughter cattle arrive at this market by rail, and western cattle arrive both by truck and rail. In the case of cattle arriving by rail, the method of handling is the same as that which has been described with respect to slaughter cattle arriving by truck, except that slaughter cattle arriving by rail are taken to the alleys of the commission firms by employees of the stockyard company. The night yard service may, at times, be applied to rail arrivals of slaughter cattle (Tr. 835). The mode of arrival of western cattle, either by truck or rail, differs greatly from that which prevailed in 1930. The western cattle arrive during the season beginning in mid-July and lasting until January 1. During this period, stocker and feeder cattle, feeder heifers, grass-fed cows, and feeder calves arrive in great numbers. While the majority of western cattle still arrive by rail, there has been an appreciable increase in truck arrivals. Today, there are not as many large western consignors as in 1930 because many of the large shippers sell their cattle direct or on the range at home. Consignments consisting of one and two cars and of multiple ownership are frequent. These changes have increased the burden of sorting and grading in the case of western arrivals (Tr. 836). Sorting must be made for ownership and for brands, and then the cows, feeder heifers, steers, bulls, and calves must be separated. Much of this work takes place on Sunday so as to get ready for the Monday morn-

ing market. Truck arrivals of western cattle are handled in the same manner as that employed with respect to truck arrivals of slaughter cattle which has been previously described.

66. *The cattle salesman.*—Most of the market agencies employ a cattle salesman for each of the important classifications into which cattle are normally sorted for sale. The salesman is responsible for the sorting and preparation of the cattle for the market. As in the case of hog and sheep salesmen, he must prepare himself for the market by studying the price trends and acquaint himself with other conditions affecting the needs of the packer and order buyers. After the selling operation, the cattle are weighed and custody therefor is relinquished to the stockyard company. After weighing the cattle, scale tickets are marked and sent to the office for the preparation of accounts of sale to the shipper, which are sent to him, together with a check for the proceeds. It frequently happens that certain extra services must be performed with respect to particular consignments of cattle, such as dehorning, branding, castration, and other things which are done at the request of the shipper or purchaser. The salesman attends to these services, which are actually performed by the stockyard company.

67. *The office work.*—In addition to the preparation of accounts of sales and accounts of purchase, the office force of the market agency must remit the proceeds of the sale to the shipper. On the other hand, collection is made on the morning following the sale through the clearing house service maintained by the Sioux City Livestock Exchange. All the checks made payable to a particular firm are placed by an exchange employee into a box assigned to that firm, so that the firm's representative is able to pick them up and make a bank deposit. Such deposits are made into the custodial account for shippers' proceeds. A reconciliation of accounts of sale and bills is made at the close of each day. The handling of the details with respect to this fund is the task of the office force.

68. *Cattle yardman.*—The cattle yardman starts to work around 6 a. m. and his first duty is to find out where the various consignments to his firm have been yarded by the night yard service organization. The yardman assists in sorting the animals for ownership and grade and in feeding and watering them. He also assists the salesman in getting the alley ready to be shown. The yardman also goes to other firms and picks up any cattle which are consigned to his firm but delivered to the other firm. He also periodically checks the chutes to check in late arrivals. In such cases, he moves them up to the selling pens. He assists the salesman in getting the cattle which are sold lined up in the catch pens at the head of the scales. When the scale turn



for his firm arrives, he drives the cattle on the scale, calling out the name of the purchaser to the weighmaster and the foreman of the scale so that the cattle may be yarded in proper holding pens after they are weighed. This is important work because, if the foreman of the scale does not get the information accurately, one buyer's cattle may be mixed up with another's. Such a mix-up is difficult to straighten out. The buyers of all cattle involved in such a mix-up, in addition to the salesmen, must be on hand to help identify the cattle. If this cannot be done, some arrangement must be made with a buyer to take all the cattle involved. After the weighing, the yardman assists the salesman in marking the tickets. He then gets the alleys ready for the next arrivals.

69. *Office work.*—Certain aspects of the office work incident to the operations of the market agencies have been referred to above. In addition to the work of making accounts of sale and of purchase and of making remittances and collections, there are other functions performed by the office forces of the market agencies. Witness Johnson (Tr. 637 *et seq.*) and Witness Brown (Tr. 690 *et seq.*) gave detailed information in their testimony with respect to the office work. All office work is done the day the stock is sold and, on busy days, the office force works quite late, that is, from 7 a. m. to as late as 9 p. m. The office employees are paid on a per hour basis (Tr. 709). The burden of work cast upon the office forces of the market agencies at Sioux City has been increased because of the necessity of making various tax deductions, because of the demand for the rendition of separate accounts of sale brought about by the increase in multiple ownership of consignments, because of the necessity of making livestock feeder association remittances, because of the making of cattle brand inspection, because of the preparation of quarterly reports required in the administration of the Packers and Stockyards Act, because of the handling of order buyer's accounts, and because of the keeping of wage and hour records (Tr. 640-641). In making the shippers' accounts of sale after receiving a scale draft for the weight of the livestock sold, the office force must compute the amount of money for each draft. This information is entered on the account of sale by listing the buyer's name, number of head, weight, selling price, gross money, the various deductions made for yard expenses, trucks, freight, and commission. Then a draft or check to the seller is issued. Preparation of an account of purchase follows much the same pattern. Each account of sale is indexed under the shipper's name and address, which includes, also, the date and number of head of livestock sold. The accounts of sale for each day are classified by species and balanced by listing the total of each expense item and making a permanent record

thereof (Tr. 641). Sometimes, the shipper accompanies his livestock to market and, in these cases, it is frequently the practice to give the shipper a check for the net proceeds while he is still in the office. Otherwise, it is mailed to the shipper before the close of the business day. Sometimes, at the request of the shipper, it is necessary to remit the net proceeds to his local bank. Where multiple ownership is involved, this work is complicated by the necessity of prorating the expense items and making separate accounts of sale for the different shippers. Shippers often request copies of their accounts of sale for income tax purposes, and this throws an extra burden upon the office force. A few of the market agencies at Sioux City either provide their patrons with, or assist them in obtaining, credit with which to transact business. Where this is done, it is handled by the office force. The agencies do not contend that the extension of credit should constitute any part of their market agency functions for rate purposes. Collections are made each morning following the day of the sale through the facilities of the clearing house service (Tr. 714). By 10 a. m. all checks for purchases made the day before must be deposited in the clearing house. The office force of the various market agencies pick up these checks and deposit them in the respective custodial accounts for shippers' proceeds. The market agencies at Sioux City have long maintained such accounts even before action was taken with respect to these accounts by the Department of Agriculture. Each day a check is usually drawn on this account and deposited in the general account of the market agency concerned. The amount of such check is determined by the total sales credits for the previous day (Tr. 714). This is the amount deducted from the shippers' proceeds for yardage, insurance, inspection, feed, brand inspection, bedding, commission charges, and any other charges that the market agency may have made for the shipper. The balance of the custodial account for the shippers' proceeds, sometimes called the "float", represents money on hand for which checks have been issued for proceeds of livestock, for hauling charges, or for truckers but which have not yet been cashed. Close supervision over custodial accounts for shippers' proceeds is maintained by the auditing service of the Exchange. Other duties performed by the office have been created by the necessity of making transportation tax deductions, the making of social security tax deduction, the withholding of income taxes required by existing law, and the keeping of such records as are required by the wage and hour provisions of the Fair Labor Standards Act. The office force, also, attends to advertising, the issuance of market news information, and the handling of general correspondence and communications with the patrons of the respective firms (Tr. 644-645).

70. *Estrays*.—The market agencies feed and water estrays and, generally, give these animals the same care as any other animals consigned to a particular agency. The animal may be held for one day to ascertain if any information may be found as to its disposition. On the second day, such animals are sold. The proceeds of such sales are held until the market agency receives authority from some responsible party as to the exact disposition thereof. If the animal is a "pick up" in the yards, the fact is made known to the stockyard superintendent. If so ordered by this person, the animal is sold and the proceeds turned over to the stockyard company.

71. *Cripples*.—The market agencies also have certain duties to perform with respect to crippled animals at the chutes. In such cases, a record is made of the animal, and an order is placed to have a local packer haul the animal to the plant which is killing such animals at that particular time. The animal is killed and payment therefor is made on a dressed-weight basis, and the proceeds are paid to the reporting market agency which remits the actual proceeds to the shipper after deducting regular marketing charges. In case the animal is crippled while in the pens of the market agency, the animal is hauled out of the pen and, if able to eat and drink, feed and water are provided. Such losses are reported to the Transit Insurance Agency which makes a determination of the validity of the claim.

72. *Dead animals*.—Dead animals are reported to the stockyard company. They are weighed under the direction of such company and a weight ticket is furnished to the commission agency. A salvage charge is paid the shipper based on the schedule in effect for dead carcasses. The market agency concerned secures information respecting the charge for carcasses from the Sanitary Rendering Company. The insurance company is notified of the dead animal, and such company makes a determination as to the validity of the claim.

#### **Appraisal work with respect to sheep, hogs, and cattle**

73. The market agencies at the Sioux City market also engage in the performance of appraisal work with respect to sheep, hogs and cattle. The Acting Secretary of Agriculture took note of the increased demands of patrons for appraisal service in his order of July 25, 1931, in this proceeding. In Paragraph 35 of that order, the Secretary stated in part as follows:

"Frequently salesmen are called upon to go to the country to look at livestock before shipment and may be requested to sort the livestock preparatory to shipment. This service is confined largely to cattle and sheep and is requested by a relatively small proportion of the producers of such livestock. This is known as 'appraisal work' and is ordinarily confined to those producers who have a carload or more of livestock to ship to market. The demand for this appraisal service

has grown during the past few years. The respondent commission firms regard this activity more or less as a business-getting venture. Much time and expense are required in making these appraisal trips."

The conditions noted by the Acting Secretary in the passage just quoted have changed with the passing of the years. The appraisal work is not now confined to cattle and sheep, but also encompasses hogs. The demand for this type of service has increased greatly. The producers and livestock feeders who testified at the hearing stated that they considered the appraisal work at Sioux City as a service essential to the marketing of livestock. The market agencies do not employ personnel to call from house to house, from farm to farm, or from ranch to ranch, passing out books and pencils and persuading the potential shipper to use the facilities of the market (Tr. 717), although it is true that while on appraisal trips the representatives of the commission firms may call upon prospective patrons. The patrons who utilize the Sioux City market are not interested in having an inexperienced man come to their farms and give vague information as to market conditions and selling worth of particular livestock. The only kind of individual who can render the service demanded is a salesman or a man of salesman calibre (Tr. 718). Livestock feeders of the present generation are better educated than their fathers. Many are college trained, and almost all are high school graduates. The 4-H Club work has developed in them a keen sense of the function they perform. They know of economic conditions and trends and of different outlets for their livestock (Tr. 718). They, therefore, desire the type of appraisal service which the market agencies at Sioux City are giving. They rely upon skilled judgment of the commission salesmen to appraise their livestock in the feed lot before shipping. It was shown by many witnesses, particularly through witness Epperson, a representative of the market agencies, and witness Anderson, a patron of the market, that some patrons who request this service do not receive it because of distance from the market or other conditions which render it impracticable to send a person to the range or feed lot of the particular patron. In this regard, however, witness Epperson and witness Anderson (Tr. 273 *et seq.*) stated that the market as a whole receives a direct benefit from this appraisal service in that it brings a flow of livestock to the market, thus providing a variety of livestock to fill the demands of order and packer buyers, and that, in turn, this attracts packer and order buyers to the market and increases the usefulness of the market as a whole for all the patrons. Witness Anderson was asked by counsel for the Livestock Branch if he thought the appraisal service improved the market. He replied:

"Certainly, it brings the proper buyers in here at the proper time. It brings your livestock to the market at the time that there is a buyer here for it, both fat and feeder. You can't do this all over the telephone" (Tr. 376).

Counsel for the Livestock Branch also asked Witness Anderson whether he thought the cost of the appraisal service should be borne by the shipper. He replied:

"Yes. They should be. And I don't think there is any way you can say that cost is inequitable because it is going to be wholly distributed where only some of the shippers may receive only indirect benefits from it rather than direct benefits. I think that country service, though, is properly chargeable, a very large part of it, to the selling service" (Tr. 377).

The Livestock Branch did not offer any evidence as to appraisal service. Respondents' witnesses who were cross-examined admitted that the performance of this particular work, by its very nature, had a tendency to maintain the business of the market agencies, but they also pointed out that the successful performance of any of their tasks by the commission firms had an indirect tendency to maintain the competitive position of the market. From the cross-examination it appears true that in some cases the appraisal work in the country is done but the livestock is not shipped to the market. Witness Bufkin, the auditor of the Livestock Branch, testified that the appraisal work performed by respondents was a service (Tr. 1974), but he was of the further opinion that the service was performed to get or maintain business. The question as to how expenses of appraisals are to be handled is discussed hereinafter.

#### **Other activities of market agencies**

74. *Advertising and soliciting.*—The market agencies engage in a moderate amount of advertising. This consists of advertisements appearing in newspapers, trade papers and upon billboards. It is also customary for the market agencies to pass out calendars and pencils from time to time (Tr. 715). Respondents feel that a reasonable amount of advertising is, of course, appropriate in a business of the type in which the respondents are engaged. Competition is keen.

75. *Market news and service.*—The market agencies transmit market intelligence to their patrons by means of letters, radio, and appraisal trips. Respondents and their witnesses regard appraisal work, the issuance of market news by letters and circulars, and their daily radio programs as "market news and service." All the market agencies as well as the stockyard company contribute to the Sioux City Livestock News and Educational Foundation, which is the sponsor of a particular radio program. A transcript of the actual text of a broadcast of market information by the Foundation (and by the Government mar-

ket news specialist at Sioux City) appears in the record (Tr. 253, 268). Witness Hale, who is in charge of the market news service of the Livestock Branch at the Sioux City stockyard, testified with respect to the market news information issued by his office. Samples of the daily livestock report (Respondents' Exhibit 14) and the weekly livestock market review (Respondents' Exhibits 15 and 16) were introduced through Witness Hale. These are Government reports. Witness Hale stated that the market agencies participate actively in the distribution of such material (Tr. 336). He testified that the commission firms furnish the paper and bear a proportionate part of the cost of printing. Some firms, with the approval of the Livestock Branch, furnish their own paper with their names on it (see Respondents' Exhibit 17, which consists of a sample letterhead). Where the letterhead of the participating commission firm is not used, blank paper is furnished by the market agency in securing reprints of the Government reports. Whether the blank report style or the letterhead style is used, the report is enclosed by the market agencies with their various letters to their patrons transmitting accounts of sale and with respect to other matters. Witness Hale stated that the actual mailing list of the Government market news service, with respect to the daily reports, was only around 85 in number (Tr. 337), and that, in addition, 25 or 30 more names were on the mailing list for the weekly review (Tr. 338). By virtue of the participation of the market agencies, however, Witness Hale testified that the actual distribution of these market news reports was expanded manifold. For example, on April 27, 1948, a thousand daily reports were prepared by the market news service for the use of the commission firms (Tr. 337). This, therefore, means that a thousand persons received this report on that day in addition to the 85 to whom it was sent by the market news service of the Government. Similarly, with respect to the weekly report, the distribution runs as high as 7,000 (Tr. 338), although, if it were left to the market news service of the Livestock Branch unaided to distribute this report, only about 125 would be sent out (Tr. 338). Witness Hale testified that he felt that the issuance of market news in the form of market news letters, as described by him, was of value to the patrons of the market and that this was the reason it was performed by the Government (Tr. 339, 344). With respect to the usefulness of the participation by the market agencies in such distribution, he stated (Tr. 339) :

"Naturally we feel that the more information we could get out to the producers is of value and through the commission firms, their cooperation, the livestock agencies at the market, we get much wider distribution."

He also stated that (Tr. 344) :

"It gives us an opportunity to distribute our information that we wouldn't have otherwise and it is of value to the man who receives it, principally the producer."

Witness Hale further testified that, under his limited budget and personnel, if the commission firms were forced to discontinue their participation in the distribution of these reports, he could not issue more than 200 per day or per week in view of the limitations upon him (Tr. 345-346). The reports which carry the name of the firm at the top (Respondents' Exhibit 17) are approved by the Washington office of the market news service of the Livestock Branch. The name, address, and telephone number of the firm appear thereon (Tr. 346-348).

Market news information is also transmitted to the patrons of the market agencies by means of the appraisal service which has heretofore been described. The patrons of the market make their requests for appraisal work by letter, telegram, telephone, and other means of communication. These requests are reviewed by the agencies concerned, and periodic trips are made to the territory by skilled salesmen as a rule. These trips, in the main, take place on Friday and Saturday although they are performed at times during other days of the week. Only where it is impractical to make such a trip is the request for such service not fulfilled. It is not confined to patrons dealing in large or small consignments (Tr. 251). The performance of appraisal work enables the market agencies at the Sioux City market to keep abreast of the supply of livestock on hand and available at different times. Witness Epperson testified that, through the performance of the appraisal work, his firm had a record of thousands of head of livestock and that they thereby knew just what kind of livestock was available. In this way, the needs of order buyers and others may be promptly met and the reputation of the market among order buyers is thereby enhanced.

76. *General assistance to patrons.*—The Exchange Building in which the market agencies are located is a center of activity on market days and many patrons gather there to secure information and assistance concerning their livestock marketing problems and to secure information and assistance from the market agencies with respect to other business matters which they desire to transact in town. In other words, they use the office of their market agency as a kind of "headquarters" on their periodic trips to town.

77. *Expert advice on value.*—Quite often the salesmen of the respondent market agencies are asked by their patrons to assist in the dissolution of a farmer-operator partnership by determining the value of livestock on hand, which determination of value is used by the partners in settling their partnership accounts.

78. *Dead and crippled appraisal.*—In the case of livestock losses either by death or by crippling, the salesmen of the market agencies are frequently asked to appraise the true value of the animal, and this appraisal is the basis for settlement by the insurance company. No compensation is allowed for this work.

79. *Lost livestock.*—The commission firms assist the shipper in locating small lots of livestock consigned to the market in plural ownership consignments (Tr. 721). If the agency locates the animals in question and sells them, the usual commission charges are made, but many times the market agency searches the stockyard company's records only to find that some disposition has already been made of the animals in question in which case no compensation is paid to the market agency.

80. *Income taxes.*—The increase in the number of livestock producers and feeders who have been required to file federal and state income taxes in recent years has thrown an additional burden of work upon the market agencies because they are frequently requested to make up duplicate returns on consignments sold throughout the year. No compensation as such is paid to them for this work (Tr. 721-722).

81. *Credit references.*—Personnel of the market agencies frequently spend time in giving credit references with respect to out-of-town shippers not acquainted with local business concerns.

82. *Turning over livestock.*—The turning over or picking up of livestock between commission agencies, in the case of plural ownership in consignment, is an additional task frequently performed by the market agencies over and above the regular handling of consignments heretofore described and for which no compensation is available (Tr. 722).

83. *Brand inspection.*—In the handling of cattle from an area using brands, it is necessary that the Brand Inspector look at the cattle. In such cases, it is the practice of the commission firm to send an employee with the Brand Inspector in order to identify the cattle in question and to make a report of any questionable brands so that, at the time of weighing, the proceeds of such animals may be rightfully disposed of or withheld until proper credentials have been presented to the Brand Inspector and the latter has given a final clearance as to the disposition of the proceeds. A charge is made for brand inspection, but such charge is turned over to the Brand Inspector's office. No charge is made by the agency for its services.

84. *Miscellaneous.*—The radio service and night yard service are also performed by the market agencies, the costs of which are not wholly reflected in their rates and charges.



**The Sioux City Livestock Exchange**

85. All the commission firms presently operating at the Sioux City market with the exception of three cooperative organizations are members of the Sioux City Livestock Exchange. The three cooperatives which are not members are the Producers Livestock Commission, the Progressive Farmers' Cooperative, and the Farmers Union Livestock Commission. However, these organizations participate in the programs of the Exchange, paying the regular proportionate part of the costs of the conduct of such programs. There is testimony in the record that the Exchange would quickly amend its by-laws to admit the cooperatives to membership in the event they indicated a desire to join the Exchange. The Exchange performs certain services common to all the market agencies. Represented in the membership of the Exchange are 22 market agencies operating as commission firms, 8 market agencies operating as order buyers, and 26 dealers (Tr. 26, 65, 66). Also, there are 143 members of the Exchange, 77 of these are employees of the market agencies operating as commission firms, 22 are associated with order buyers, 40 are dealers, and there are 4 inactive memberships, making a total of 143 (Tr. 129-131).

86. The Exchange exists for the convenience of the livestock industry in the Sioux City area. It performs certain functions of primary interest to its members (and to the cooperative market agencies who are not members but who participate in its programs), and it performs other functions of primary interest to the patrons of the market. The Exchange has been in existence since it was organized in 1888.

87. The functions performed by the Exchange, or under the supervision of the Exchange, can best be illustrated by an examination of its specific program. The Exchange conducts the programs set forth in the following paragraphs.

**Programs of the Exchange**

88. The Exchange operates an ante-mortem inspection of cattle and hogs with eight lay inspectors in the cattle division and seven in the hog division. In 1930 only four cattle inspectors were employed. All agencies on the market use this service whether or not they are members of the Exchange. The service is of benefit to the general public health and to the patrons of the market. The Exchange only maintains a clearing house service to assure appropriate accounting supervision and prompt payments and to give patrons of the market an assurance that the collections and payments to be made to them will be made quickly and accurately. All payments for livestock bought or sold by the different agencies are cleared through the Exchange clearing house. The Exchange also requires its members to

file a guarantee of payments if the member acts as clearor for any other agency.

89. A number of years prior to the requirement of the Department of Agriculture, the Exchange has had in effect a rule requiring members to maintain custodial accounts for shippers' proceeds and the auditor of the Exchange has access to the agencies' books to audit or check to see that the accounts are intact and not being used for other purposes. The full-time auditor of the Exchange supervises the books of the members to aid in getting out reports to the Department, to see that the tariff is correctly applied, etc.

90. The Exchange maintains a Traffic and Claims Department handling traffic claims, transportation problems, rail schedules, and related matters. It handles only claims against rail carriers. It files claims or furnishes shippers with information upon which the shipper may file the claim. Upon the amounts it collects, the Exchange receives 15 percent but this does not compensate the Exchange for the amount of work performed. The Exchange also acts as the medium for the remission of certain deductions from payments to patrons, such as brand inspection fees.

91. The Exchange supervises all trade practices to the end that they may be kept within the bonds of ethics and propriety. Witness Cunningham testified that the Exchange was very successful in its police work in regulating trade practices and has found it necessary to take disciplinary action in very few instances. When such occasions arise, a hearing is held before the directors of the Exchange and the accused is represented by some member of the Exchange of his own choosing (Tr. 47). Patrons are entitled to make complaints before the Exchange. Often the Exchange is able to handle minor things dealing with practices in the alleys and pens on an informal basis. Witness Lisle, the market supervisor of the Packers and Stockyards Division of the Livestock Branch, testified that during his tenure of office at Sioux City extending over some twenty years he had found it necessary to forward only four or five complaints of a formal nature to Washington concerning the conduct of market agencies at Sioux City. In two of these cases the market agency admitted the violation (Tr. 221-222), and in two other cases it was found that the market agency had violated the regulations of the Department. With reference to the trade practice work of the Exchange, Mr. Lisle stated that it had been helpful in his work in administering the Packers and Stockyards Act.

92. The Exchange also participates in planning and carrying forward an annual Baby Beef Show and Sale, an annual Barrow Show

and Sale, a 4-H Feeder Calf Sale, and an annual Swine Producers' Day. It acts as a cosponsor for these events, shares in the expenses, and undertakes responsibility for the execution of the programs. It thereby seeks to promote the latest methods of feeding and handling livestock to the end that the future generation of livestock producers and feeders will be acquainted with the latest and most appropriate way of conducting operations. The Exchange also takes an active part in various livestock producer meetings all over the territory. These average between 75 and 100 annually. Usually these meetings are held for the benefit of producers and are sponsored by the producers themselves. The Exchange participates in them by invitation and attempts to furnish information that will be of value to the producers.

93. Technically, the radio market news service is performed by the Sioux City Livestock News and Educational Foundation. Actually, the Exchange has spearheaded the performance of this service, and the stockyard company and all the market agencies contribute, on a pro-rata basis, to the financing of the radio program (Tr. 39 *et seq.*). The major part of all market news service on the market is carried out by radio. The Sioux City market pioneered this particular type of radio market news. It began in February 1940. Through this medium the patrons of the market are kept fully aware of the market from day to day and are kept informed on the trends of the markets and of any conditions or circumstances which might arise to influence the over-all marketing picture. There are two periods of broadcast, a 5-minute broadcast from 7:25 to 7:30 a. m. and a second period from 12:15 to 12:35 p. m. Actual broadcast of the program beginning at 12:15 p. m. on April 27, 1948, appears in the record (Tr. 253 *et seq.*). This program is broadcast on radio stations WNAX and KTRI. The program gives authentic market information together with trends and news of interest to the livestock producers. During the 5-minute early morning broadcast, the estimated receipts of the various central public markets are given, together with a resumé of the receipts of the day before and of any late sales of the day before that might be of interest to listeners. During the forenoon, three men devote all their time to the preparation of the noon broadcast. They glean their information first hand by making the rounds of the cattle, hog and sheep divisions. The radio reporter during the noon broadcast gives the number and kind of livestock sold, the name of the shipper, a description of the physical characteristics of the livestock, and also the class and grade into which it might be fitted (Tr. 41-42).

(a) There is a fundamental difference between the type of broadcast given by the market agencies and that conducted by the Government

Market News Service, which also appears in the record (Tr. 268). This difference is based upon the fact that the description employed by the Market News Service is related to the various categories of dressed meat into which the livestock might be fitted, and the market news reporter does not make use of the names of particular individuals. On the other hand, the reporter for the market agencies has greater opportunity to describe the type of cattle sold in terms which the shippers understand (Tr. 349). Witness Hale, who performs the broadcast for the Market New Service, stressed this difference (Tr. 348). He stated that, while he and witness Cunningham, who performs the broadcast for the market agencies, usually agree with each other in reporting market trends, Mr. Cunningham is able to give a much fuller description of the livestock sold (Tr. 350). All the patrons who testified stated, without exception, that they listen to the broadcast by the market agencies and that it is of a distinct character and service to them. The use of the names of individual shippers enables the listener who is familiar with the patron and his livestock and who might have livestock of the same class and description, to get an idea of what he may expect his own livestock to bring (Tr. 42). A central public market such as that at Sioux City sets the pace in livestock market price trends which are utilized by shippers in the area even when they do not ship to the Sioux City market (Tr. 1302 *et seq.*).

(b) Witness Tincher, vice president and general manager of the Cowles Broadcasting Company, operator of Station WNAX, testified with respect to the coverage and publicity of this radio program of the market agencies (Tr. 193 *et seq.*). He testified that the station over which the program is broadcast covers North and South Dakota, Minnesota, Iowa, Nebraska, Montana, and Wyoming, and several provinces in Canada. He said that the station also had coverage to some extent in Kansas, Missouri, Wisconsin, and Colorado, and that the program has enormous popularity.

94. *The income and expenses of the Exchange.*—The Exchange is not an ordinary business run for profit. Witness Cunningham, the Secretary-Traffic Manager of the Exchange, introduced into the record an analytical operating statement for the year ending April 2, 1948 (Respondents' Exhibit 19), illustrating this point. It shows the sources of the income and costs of running the Exchange for the period indicated. There are only four sources of direct revenue and the balance of the income necessary for the operation of the Exchange is obtained by assessment on the members (Tr. 942). The assessment made upon members is ten cents per car based on volume. Under arrangements in effect at the market, the Livestock Transit Insurance

Company turns over to the Exchange five percent of their monthly premiums. This is compensation to the market agencies for the work of the market agencies in making collections for the insurance company. The Exchange voted that these revenues should accrue to the account of the Exchange to offset operating costs. The amount of the reserve set up by the Exchange fluctuates from year to year depending upon the income and expenses of the Exchange (Tr. 945). Witness Cunningham testified as to the necessity and propriety of incurring the expenses indicated by Respondents' Exhibit 19.

### **III. Respondents' Estimates of the Cost of Rendering the Service**

#### **Audit data**

95. Upon the conclusion of that portion of their case showing the character of their services, the respondents proceeded to offer evidence concerning their costs of doing business. There were offered in evidence audits showing historical income and operating cost data of the firms doing business at the market. This audit material was submitted through J. W. Corbett. Witness Corbett is a graduate of Benjamin Franklin University, Washington, D. C. Formerly he was an accountant with the Packers and Stockyards Division, Livestock Branch, and has had considerable experience in auditing the records of market agencies at a number of central livestock markets. At the present time he is the auditor of the Sioux City Livestock Exchange.

96. Respondents' Exhibit 20 is a summary of the audit material contained in Respondents' Exhibit 21-A-H (which is a detailed audit of six representative market agencies) showing the historical cost and income data of each of the six firms for the years 1940 to 1947, inclusive. The six market agencies thus audited were Carpenter, Hudson-Coe, Mid-West, Farmers Union, Long and Hansen, and Steele-Siman. Oral testimony was given by various witnesses in explanation of the exhibits. It was stated that the six firms whose operations were studied consisted of two large firms, two medium-sized firms, and two small firms, and that such firms were typical and representative of the commission firms at the market. Respondents' Exhibit 20 shows that for six representative firms, the average profit per head for the three species has declined since the year 1940 despite an increase in volume for each species. In the case of selling hogs, comparing 1940 and 1946, there has been an increase in volume of 14.3 percent, an increase in income of 11.4 percent, an increase in expenses of 23.7 percent, and a decline in average profit per head from \$.0663 in 1940 to \$.0474 in 1946. In the case of cattle and calves, comparable figures are an increase in volume of 85.5 percent, an increase in income of 90.1 percent, an increase in expenses of 97.7 percent, and a decline in the average profit per head for selling cattle and calves from \$.0462

in 1940 to \$.0258 in 1946. With respect to selling sheep, the figures are a 96.2 percent increase in volume, a 57 percent increase in income, a 96.5 percent increase in expenses, and a net loss of \$.0117 per head in 1946 compared with an average profit per head in 1940 of \$.0178.

97. Respondents' Exhibit 23 is a summary statement showing financial and operating data of all market agencies operating at the market. Shown on Table 1 thereof, Lines 27 through 40, is a statement of operating income and expenses for all such agencies for the calendar year ending December 31, 1947, as follows:

Income:		<i>All market agencies</i>
Selling commissions.....		\$1, 586, 756. 59
Buying commissions.....		70, 226. 47
Resale commissions.....		23, 011. 16
Other income (excluding interest income)....		37, 651. 79
Total income.....		<u>1, 717, 646. 01</u>
Expenses:		
Employees' salaries and bonuses.....		789, 610. 27
Other expenses.....		528, 588. 80
Total expenses.....		<u>1, 318, 199. 07</u>
Net income from market agency operations....		<u>399, 446. 94</u>
Interest income.....		12, 379. 84
Owners' salaries and bonuses.....		(134, 363. 14)
Federal income taxes.....		(7, 571. 15)
Reported net income.....		<u>269, 892. 49</u>

98. With respect to the item of \$789,610.27 on the above table, covering employees' salaries and bonuses, there is set forth on Table 2 of the exhibit the salary range of such employees for the year 1947 as follows:

Number of employees—full time.....	295
Number of employees—part time.....	155
Total number of employees.....	<u>450</u>
Individual compensation:	
Under \$1000 per annum (includes all part time employees) .....	194
\$1,001 to \$2,000 per annum.....	72
\$2,001 to \$3,000 per annum.....	95
\$3,001 to \$4,000 per annum.....	49
\$4,001 to \$5,000 per annum.....	23
\$5,001 to \$6,000 per annum.....	6

## Individual compensation—Continued

\$6,001 to \$7,000 per annum-----	7
\$7,001 to \$8,000 per annum-----	3
\$8,001 to \$9,000 per annum-----	1
Total -----	450

Respondents contend that upon the basis of such salaries employees in the industry are considerably underpaid.

99. Respondents introduced Exhibit 30 for the purpose of showing the effect of projecting 1947 income and expenses into 1948. The exhibit gives appropriate consideration to the higher rates set forth in respondents' proposed tariff, to increased expenses of operation, and to respondents' anticipated decline in receipts of livestock for 1948. The basic figures shown in the exhibit are taken from Respondents' Exhibits 23 and 28.

	<i>Total all market agencies</i>
Income for year 1947-----	\$1,717,646.01
Less estimated decrease due to decline in volume for the year 1948-----	280,163.62
Total -----	1,437,482.39
Estimated effect of applying proposed tariff—an in- crease in revenue of-----	487,617.86
Income reflecting estimated decrease in volume and proposed increase in commission charges under proposed tariff-----	1,925,100.25
Percent of increase in income in 1948 over 1947----	12.08
Actual expenses for year 1947 (exclusive of owners' salaries)	
Salaries-----	789,610.27
All other expenses-----	528,588.80
Total -----	1,318,199.07
Estimated increase in expense for the year 1948:	
Salaries (11.95 percent)-----	94,358.43
All other expenses (10.88 percent)-----	57,510.46
Total -----	151,868.89
Total estimated expenses for 1948-----	1,470,067.96
Percent of increase over 1947-----	11.52
Net income available to owners in 1948-----	455,032.29
Comparable actual income available to owners in 1947-----	399,446.94

**Respondents' estimate of livestock receipts for 1948**

100. To arrive at the estimated income of \$1,925,100.25 for 1948 as shown in the foregoing table, the respondents adjusted their 1947 income of \$1,717,646.01 to reflect the effect of anticipated decreased marketings of livestock for 1948. Respondents estimate that there will be a decline in cattle marketings at the Sioux City stockyard of 19 percent, a decline in hog marketings of 14.4 percent, and a decline in sheep marketings of 18 percent. Based on such estimates, respondents' revenues would decline by \$280,163.62. The estimates shown above relate to anticipated marketings of livestock at Sioux City and are based upon information contained in Respondents' Exhibits 26, 38, 48, 49 and 50, and the testimony of R. C. Ashby, J. W. Corbett and D. H. Cunningham. Witness Ashby is Professor of Livestock Marketing in the Department of Animal Husbandry and Agricultural Economics at the University of Illinois. Formerly, he was professor of livestock marketing at several other universities and at one time he was a district supervisor for the Packers and Stockyards Administration, U. S. Department of Agriculture. He testified at a hearing in 1946 with respect to estimated livestock receipts at the St. Louis National Stockyards, P&S Docket No. 1246.

101. Respondents' Exhibit 26 contains a publication entitled "Livestock Market News", issued January 21, 1948, by the U. S. Department of Agriculture. On page 64 thereof it is shown that the number of sheep and lambs on feed had declined approximately 18 percent on January 1, 1948, as compared with the year 1947 in the five-state area from which the Sioux City market normally receives its sheep and lambs. Another document in the exhibit is entitled "Pig Crop Report", issued December 19, 1947, by the U. S. Department of Agriculture. On page 4 thereof it is shown that the decline in sows farrowed would be approximately 14.4 percent for the same five-state area. The remaining document in the exhibit entitled "Cattle on Feed, January 1, 1948", is also issued by the U. S. Department of Agriculture. This document shows that the average decline in volume of cattle on feed on January 1, 1948, was 19 percent.

102. There was introduced through witness Ashby Respondents' Exhibit 38 dealing with the decline in the population of livestock in the Sioux City area as of January 1. From the exhibit, it is seen that for Iowa, Minnesota, Nebraska, and South Dakota, the livestock populations as of January 1, 1947, and January 1, 1948, respectively, were as follows:

	1947	1948
Cattle.....	15, 195, 000	14, 441, 000
Hogs.....	18, 296, 000	17, 056, 000
Sheep.....	4, 454, 000	3, 974, 000



Witness Ashby testified that a decline in marketings of livestock could be expected for the succeeding 12 months or possibly longer.

103. Respondents' Exhibit 48 is a release of the U. S. Department of Agriculture entitled "Cattle on Feed", dated April 1, 1948. The document contains an estimate of the number of cattle on feed as of April 1, 1948, in the 11 corn belt states compared to the number on April 1 of the previous year. The decline of cattle on feed was estimated to be 25 percent. Exhibits 49 and 50 were offered by respondents for the purpose of rebutting certain testimony offered by the Branch concerning the relation of cattle on feed to total marketings. The Branch's witness had offered testimony to show that Respondents' Exhibit 26, which indicated a decline of 19 percent as of January 1, 1948, in the volume of cattle on feed in the area, should not be taken as an indication of the decline in marketings from the area because the total number of feed cattle marketed from the area is probably not more than 25 percent (he later revised this to 10 percent) of the total marketings and that more consideration should be given to the total livestock population figures than to cattle on feed figures. Respondents' Exhibit 49 shows the percentage of fed cattle sold by four commission firms in the first four months of 1948. The pertinent parts of the exhibit disclose the following information:

Firm	Month	Fed cattle sold	All cattle sold	Percentage
Steele-Siman Co.....	January.....	6,991	10,355	67.5
Wagner.....	February.....	4,218	6,338	66.6
Ingwersen.....	March.....	3,018	3,355	90.0
Producers.....	April.....	6,499	6,767	96.0
		20,726	26,819	77.29

<sup>1</sup> Average.

Witness Cunningham testified that the sales of fed cattle by the above firms, amounting to 77.29 percent of all cattle sold, were representative of the market as a whole. He also testified that for the second four months of the year the number of fed cattle sold would constitute about 70 percent of the total number of cattle sold, and that for the last four months of the year about 35 percent of the cattle sold at Sioux City would be fed cattle. Respondents' Exhibit 50 shows the proportion of the salable receipts of cattle and calves at the Sioux City market during the first four months of specified years to the total number of receipts for such years, as follows:

*Salable receipts of cattle and calves*

	Number of head first 4 months	Number of head for full year	Percentage of first 4 months to full year
1943.....	326, 755	1, 137, 986	28. 71
1944.....	383, 009	1, 205, 688	31. 77
1945.....	428, 992	1, 426, 924	30. 06
1946.....	459, 100	1, 431, 877	32. 06
1947.....	491, 128	1, 435, 409	34. 22
1948.....	347, 385		34. 22

104. Upon the basis of the above figures, respondents contend that the number of fed cattle marketed at Sioux City is considerably in excess of 10 percent; that, in fact, it exceeds 35 or 40 percent of the total cattle marketed at Sioux City. Respondents also contend that, in determining whether an anticipated 19 percent decline in cattle marketings at Sioux City is correct, consideration should be given to the actual experience of the market and the personal knowledge which the respondents have of conditions affecting the market rather than to base estimates exclusively on livestock populations in the supply area.

105. With respect to hogs, respondents contend that their estimate of a 14.4 percent decline should be accepted since it is respondents' estimate of the marketings to take place at Sioux City, which the Government did not refute. There is no disagreement between the parties as to an estimated decline of 18 percent in sheep marketings at Sioux City for 1948. As stated above, respondents estimate that their revenue will decline \$280,163.62 in 1948 because of the anticipated decline in livestock marketings.

106. Respondents prepared and offered in evidence Exhibit 27. This exhibit shows the effect of applying respondents' proposed tariff for a representative period based on the experience of five firms handling all species of livestock. The anticipated percentage of increase in income, as shown by the exhibit, is as follows:

	<i>Percent</i>		<i>Percent</i>
Cattle sales.....	36. 132	Cattle resales.....	34. 691
Hog sales.....	31. 784	Hog resales.....	165. 602
Sheep sales.....	18. 780	Sheep resales.....	159. 093

The percentages were applied to the 1947 income after volume adjustment, and the results were combined, giving \$487,617.86 as the additional amount to be expected from the application of the proposed rates (Tr. 1063). Respondents applied the headage rates provided in their proposed tariff to estimate the income figure for the year 1948.

107. The estimated increases in expenses for 1948 listed above in paragraph 99, namely, an increase of \$94,358.43 in salaries (other than owners' salaries) and an increase of \$57,510.46 in "all other expenses" were derived from Respondents' Exhibit 28 estimating increases in expenses for the 12 firms stipulated as representative. Respondents' Exhibit 29 contains a signed statement by each of the owners showing in detail the particular expenses which would be increased or decreased in 1948. Respondents state that the increases are reasonably and prudently incurred.

108. Respondents offered Exhibit 42, which is described as a summary of evidence on compensation due respondents for personal services, as adjusted for 1948 to give effect to the proposed tariff. This exhibit is as follows:

Estimated income under proposed tariff for 1948-----	\$1, 925, 100. 00
Estimated expenses under proposed tariff for 1948---	\$1, 470, 068
Deduct—	
Premiums on owners' life insurance included	
above-----	(3, 678)
Iowa personal income tax included above-----	(575)
Add—	
Estimated rate study expenses per annum-----	15, 000
	————— 1, 480, 815. 00
 Total compensation to market agency owners-----	 444, 285. 00
Minimum return on capital invested and employed in business at	
10% (Exhibit 40, Table 2)-----	101, 081. 00
 Amount available for owners' salaries-----	 343, 204. 00
Number of market agency owners (Exhibit 43, Table 1)-----	47. 4
Amount available per owner per annum-----	7, 241. 00

109. With reference to the foregoing table, it is noted that respondents eliminated from operating expenses an item of \$3,678 representing premiums paid on owners' life insurance and \$575 paid to the State of Iowa for personal income tax. They added an item of \$15,000 representing the estimated cost of performing certain studies for rate purposes and for amortizing the expenses of this rate proceeding. It was estimated that with respect to the latter item, the cost would include two employees at a total of \$9,000 per annum to perform rate work studies and \$6,000 per annum to cover the amortization of the cost of the rate case. In this connection, it was stated that it is well established in regulatory procedure and by law that a proper allowance should be made for legal and other expenses incident to rate proceedings.

**Respondents' evidence on owners' compensation and capital charges**

110. Respondents' estimate of the amount available for owners' compensation under its proposed rates, as seen above, is \$343,204, or \$7,241 per annum for each of the 47.4 owners. In justification of the reasonableness of this result, witness Spacek, testifying about Respondents' Exhibit 43, said that owners' compensation or salaries averaging \$10,000 for each owner, or \$474,000 in all, would be fair. He said that the 1931 order afforded a basis for measuring the value of owners' salaries. He stated that the order allowed no amount for administration, but allowed a salary of \$5,000 a year for a cattle salesman and \$4,000 a year for a hog salesman. The witness then weighted such salaries according to the number of owners in 1947, and arrived at a weighted average of \$4,839 per owner. The witness then multiplied this figure by 221 percent and 220 percent, based upon the increased hourly wage in packing plants and manufacturing establishments, respectively. This resulted in a wage of \$10,742 and \$10,694.

111. With reference to the item of \$101,081, "Minimum return on capital invested and employed in business at 10%," the origin of the figure is shown in Exhibit 40, Table 2, as follows:

	<i>Total 25 agencies</i>
Invested capital in market agency business—per Exhibit 23, Table 1, line 20-----	\$303, 313. 29
Bonds furnished to conduct operations—in case of failure personal assets are assessable therefor—Exhibit 23, Table 1, Lines 10a, 11, consisting of bonds issued for the protection of shippers' proceeds, \$1,294,000, and bonds issued to protect stockyard company for payment of its charges, \$121,000-----	1, 415, 000. 00
Total capital invested or employed—without giving effect to increase in value since date of acquisition-----	1, 718, 313. 29
Return on above capital at basic 10% rate:	
On invested capital at 10%-----	30, 331. 00
On bonds furnished at 5%-----	70, 750. 00
Total-----	101, 081. 00

112. With respect to the item of \$303,313.29 shown on the foregoing table, the following is an itemization of the amount (see Exhibit 23, Table 1, lines 13–20) :

Cash-----	\$283, 020. 36
Accounts receivable-----	78, 616. 77
Other current assets-----	15, 921. 93
Equipment (including autos)-----	136, 896. 94
Depreciation reserve-----	(62, 291. 94)
Exchange memberships-----	84, 074. 86
Current liabilities-----	(232, 926. 31)
Total-----	303, 313. 29

Respondents contend that this sum represents capital invested in the market agency business. Respondents' accountant, in explaining, *seriatim*, the break down of the item stated: The item of "Cash" represents the general bank accounts of the commission firms, which contain the cash that they have on hand to conduct their businesses; the item of "Accounts receivable" represents amounts due from purchasers of livestock; the item of "Other current assets" represents inventories of feed and supplies; the item of "Equipment" represents the cost of autos and office equipment; the item of "Depreciation reserve" is the reserve account for office equipment; the item of "Exchange memberships" represents the value of memberships in the Sioux City Livestock Exchange; and the item of "Current liabilities" represents current liabilities for yardage, feed, stationery, etc. Respondents deducted the items of "Depreciation reserve" and "Current liabilities" in order to arrive at \$303,313.29, the operating assets of the commission firms.

113. With respect to the item of \$1,415,000 representing the face value of the bonds required of Respondents by the Department under the regulations issued pursuant to the Packers and Stockyards Act, Respondents say that this is a capital cost of the business on which they are entitled to a fair return. Leonard Spacek, a witness for the Respondents, testified with respect to the capital charges of the Respondents and also the rate of return thereon. Witness Spacek is the managing partner in the firm of Arthur Anderson & Co., accountants and auditors, Chicago, Illinois. He has had wide training and experience in auditing and in general rate work. His firm renders auditing and consulting services to all kinds and types of businesses, including the field of utilities. The witness himself testified in 1946 in the St. Louis National Stockyards case, P. & S. Docket No. 1246. Witness Spacek testified that the total amount of such bonds actually represents capital employed in the business and has an equal risk value with that of other operating assets employed in the business, such as cash, office equipment and supplies; that the procuring of such bonds is a condition precedent to engaging in business; and that the amount of the bonds is the equivalent of cash insofar as the Respondent firms are concerned, in view of the circumstances under which the bonds are required to be furnished. Additional evidence on this point introduced through witnesses Spacek and Epperson may be summarized as follows: The furnishing of a surety bond insofar as liability is concerned means only that the Respondents secure the bonding company as a co-obligor, the Respondents being principals on the bond; that the Respondent firms are under obligation to save the bonding company from any ultimate liability in the event the bonding company is ever forced to pay anything in the first instance

under the bond; that the giving of the bond therefore in no way relieves the Respondent firms and the owners thereof from the necessity of risking the full amount of the bond; that evidence of the importance of the bond as a capital item derives from the fact that the Department requires only the best type of collateral to be deposited with it in the event a surety bond is not posted; and that the Department, in an instance adverted to by one of Respondents' witnesses, accepted the face value of Government bonds in lieu of a surety bond, but with respect to certain municipal bonds, accepted them at only 50% of their face value. With respect to the occasions on which Respondents may have become liable on their bonds, the Respondents contend that the frequency of which they have become liable on such bonds goes only to the degree of risk incurred, not to whether a risk is incurred.

**Respondents' evidence on rate of return**

114. The Respondents offered testimony and exhibits through witness Spacek with respect to the rate of return which should be allowed on capital. It was the witness' opinion that the rate of return should in no event be less than 10%, but that actually it should be 15%. (T. 1484, 1485) One of the exhibits offered in evidence in support of the opinion thus reached was Respondents' Exhibit 10, Table 1. This exhibit contains a list of the earnings per share being presently earned on common stocks of various kinds of public utilities, and renders work information for the four large meat packing companies. Expressed in terms of percentages of the market prices of the stocks, the earnings ranged from 6.4 percent in the case of 10 water companies to 30.3 percent in the case of the four large meat packers.

115. The witness stated that few, if any, of the corporations listed in his exhibit operated a business similar to the business conducted by the Respondent market agencies, but that of the companies listed the meat-packing companies have risks generally comparable to those of the market agency business. This being so, he stated that the experience of such companies in attracting capital for investment purposes would thus fix the upper limit of the cost of capital for the market agencies, namely 30.3%, assuming that they were to seek capital by issuing stocks. To fix the lower limit of the cost of capital, he made a comparison of the returns of the other companies listed in the exhibit, which offered relatively safe and conservative investments. As shown by the exhibit, he stated that the lower limit of capital costs for such companies would be approximately 10%. Respondents contend that the witness' approach in establishing the upper and lower limits of a zone within which the rate of return should be fixed "is an objective approach to the problem as contrasted with the subjective speculations

of many experts in this field whose conclusions on rate of return are usually plucked out of the air." Witness Spacek stated that a 15% rate of return for the market agencies would be comparable to the rate of return of 6 to 6½% generally allowed for some utilities and that a return of 10% for the market agencies would be the equivalent of a rate of return of 4½ or 5% in the case of other utilities. He pointed out that the normal public utility has a tremendous plant investment, and that there are two types of capital available for securing such investment. One of these is borrowed capital which is usually available at 3% per annum. The other type of capital available for the usual public utility is equity capital (sometimes called proprietorship capital or entrepreneur capital). The witness testified that the actual cost of equity capital is substantially in excess of borrowed capital. The average cost for the two types of capital is usually about 6 or 6½%. Since the Respondent market agencies have nothing in their financial set up similar to borrowed capital, but only capital furnished by the owners, which is akin to equity capital, the only valid comparison to make is the cost of equity capital to the market agencies and the cost of equity capital to utilities in general. Accordingly, the Respondents would have to be allowed a rate of return on the capital invested and employed in their business of approximately 15% in order to place them in a position comparable to the usual public utility, which is usually allowed a rate of return of 6 or 6½%. Respondents also contend that the legal rate of interest in the community or State, or the prevailing rate of interest in the locality for secured loans on business or residential properties, or the current yield on Government or high grade utility or corporation bonds afford little or no help in arriving at a fair return for Respondents. Respondents contend that the yields demanded by investors and the earnings-price ratios of common stocks with respect to companies having risk characteristics similar to those of the market agencies will be important, as will be evidence of trends in the money market, in arriving at a fair rate of return for Respondents herein.

#### **Respondents' evidence on value of services**

116. Respondents state that if the revenues produced by their proposed rates are lower than the value of the services which they render, it must be found that Respondents have sustained the burden of showing the reasonableness of such rates. The evidence submitted by Respondents as to the value of their services consisted of testimony given by the operators and owners of large, middle-sized, and small farms and ranches. Oral and documentary evidence was also offered to show the monetary value of Respondents' services by comparing returns available to their competitors rendering similar services at various auction

markets in the Sioux City trade territory. Eleven patrons of the Sioux City market testified that they considered Respondents' services to be well worth the charges made for them and that, if necessary, they would be willing to pay more than they are presently paying for the continuation of or improvement of such services. Some of such witnesses testified that Respondents' services were adequate and were of exceptionally good quality; that they would be willing to pay any charges for good service as long as the charges were reasonable; that the night yard service and radio program furnished by Respondents were very valuable; and that the work of the Respondents in sorting livestock on the feed lots was of great financial benefit to them. These witnesses also expressed concern over the possibility that the quality of the services now being rendered may be impaired unless the market agencies are able to obtain good replacement personnel. They testified also that they rely on the commission firms to perform the service of buying and selling livestock for them, inasmuch as they do not feel competent to do so themselves. It was their opinion that the appraisal work done by the market agencies enabled shippers to receive good prices for their livestock, contributed to the integrity of the market, and that the cost thereof should be distributed among the other costs insofar as rates were concerned.

117. Through witness Ashby, the Respondents offered in evidence Exhibits 35 and 36. In Exhibit 35 is shown a comparison of the commission charges and total marketing charges at the Sioux City Market with those at livestock auction markets. In making the comparison, the witness used 20 Federally-supervised auction markets in Iowa, Nebraska, South Dakota, and Montana, and 18 non-Federally supervised auction markets in the same general territory. For purposes of comparison, the witness used the currently effective tariff governing the rates and charges of the Respondent commission firms and, to the extent that stockyard charges were utilized in making the comparisons of total marketing charges, the Sioux City Stock Yard tariff presently in effect was used. With respect to the rates and charges in effect at the auction markets used in the study, the witness testified that he used the tariffs currently applicable. Respondents' Exhibit 36 contains charts or graphs numbered to correspond to each one of the tables shown in Exhibit 35. They represent, in graphic form, the same information as that contained in the tables in Exhibit 35. The conclusion which the witness drew from the two exhibits, insofar as the monetary worth of the value of the services is concerned is that the great majority of the auction markets studied are getting a much higher return for their services than the market agencies at Sioux City.



118. Table 1 of Exhibit 35 dealing with the comparative commission charges on specified lots of livestock at Sioux City and at eight Federally-supervised auction markets and the corresponding Table 1-A, show that the low auction market ranges from 44.1% of Sioux City commission charges to 127.3% of Sioux City commission charges. Commission charges at the high auction range from 233.3% of the Sioux City commission charges to 844% of the Sioux City commission charges. The average of the four low auction markets range from 114% of Sioux City commission charges to 176% of the Sioux City commission charges. The average of the four high auction markets ranges from 198.8% of Sioux City commission charges to 345.5% of the Sioux City commission charges. The average of the eight auctions included in the study of Tables 1 and 1-A range from 133.6% of Sioux City commission charges to 234% of the Sioux City commission charges. Chart 1 of Exhibit 36 shows the foregoing information in graphic form.

119. Table 2 and Table 2-A, dealing with cattle, show that the average of the four low auction markets ranges from 95% to 114.3% of the Sioux City commission charges; that the average of the four high auctions ranges from 208.2% to 245.8% of Sioux City commission charges; and that the average of the nine auctions included in the study ranges from 155.5% to 174.1% of Sioux City commission charges. Chart 2 of Exhibit 36 shows the above information in graphic form.

120. Tables 3, 4, and 5 of Exhibit 35, relating to calves, hogs, and sheep, respectively, show Sioux City charges to be well below the charges of the Federally-supervised auction markets studied.

121. In a general way, the remaining tables and charts in Exhibits 35 and 36 disclose similar disparities regarding Sioux City commission charges compared with commission charges of non-Federally supervised auction markets. Similar disparities were shown to exist with respect to total marketing expenses at Sioux City and at Federally-supervised and non-Federally supervised auction markets.

122. The Respondents contend that the foregoing evidence demonstrates conclusively that, when compared to the charges received by competitive markets performing the same or similar service in the Sioux City area, the commission charges at Sioux City (as well as the total marketing charges, for that matter), are, on the whole, considerably below the average of the commission charges realized by the other markets in the Sioux City area. Respondents also point out that, for the most part, the Sioux City tariff used in making the foregoing comparisons was the tariff in effect at the time of the hearing and that therefore the amounts received by the respondents for their

services under that tariff are much below the full monetary worth of their services.

#### IV. Basic Issues as to Rate-Making Methods To Be Followed

123. As can be seen from the foregoing description of respondents' evidence, their position is that the rates to be prescribed should reflect the cost of rendering the service, that is (1) *operating costs* which include actual expenses, adjusted for deficiency costs and price level changes, as determined by the respective managements which must be regarded as reasonable in the absence of evidence of waste or imprudence, (2) *capital charges and costs* including allowances (a) for the use of invested capital, (b) for the risk incurred and (c) to attract additional capital to the business, and (3) net compensation to the owners for their personal services. Respondents anticipate prospective income under the rates they propose, they show that the proposed rates are within the value of service and will reflect the "cost of rendering the service" and they say that they have sustained the burden of showing that their proposed rates are just, reasonable and nondiscriminatory.

124. Respondents' methods consist of the selection of a schedule of rates which will return to respondents as a group sufficient revenue to meet their aggregate cost of rendering the service as described above. On the other hand, the Livestock Branch proposed and the examiner adopted the methods followed in prior market-agency rate-making proceedings under the act. The operating expenses of the market agencies are divided into a number of categories. The actual unit cost of each of the firms, or a representative number, for each category is ascertained for each species. From an examination of these actual unit costs in the light of the operating conditions of the firms, a "reasonable" unit cost is determined.

125. Respondents vigorously and repeatedly criticize the "unit cost" approach. They claim that actual costs of respondents not shown to be wasteful or extravagant are disregarded contrary to law, citing numerous judicial decisions, and they object to the subjective judgment involved in determining a "reasonable" unit cost from the actual unit costs experienced by the individual respondents. They claim that their methods are simpler and fairer.

126. It is perhaps true that respondents' recommended methods are simpler. Perhaps too, respondents' methods might be the ones to follow if this were a proceeding only to consider increased costs of operation over those considered in the fixing of the existing rates. But this proceeding is one which goes exhaustively into all the elements

that go to make up the rates including such questions as invested capital, rate of return, methods to be followed, etc. There is evidence of actual unit costs of representative firms in the record. The unit cost methods heretofore used by the Secretary should not be discarded unless substitutes offer superior advantages from the standpoint of rate-making principle.

127. Unlike the situations in the numerous cases cited by respondents, there is the necessity here of fixing one rate schedule for a group of individual firms rather than a schedule for a single utility. The operating conditions of the firms vary widely. Under respondents' methods, actual costs incurred by all are covered into the rates but since the rates must be uniform as to all, the rate for an individual firm is not based upon the actual costs of that individual firm but upon the average costs of the group. Therefore, respondents' methods are subject in some degree to the same criticism respondents make of the unit cost method, namely, actual costs are to some extent disregarded insofar as the individual firms are concerned. We should observe too that respondents' position seems to be that any expenses of a commission firm not testified to as wasteful or extravagant for that firm are "reasonable" costs which must be allowed. This does not necessarily follow in rate-making for a group. The unit cost analyses show some wide variations in costs for the same type of expenses. We do not believe it legally compulsory or preferable from the standpoint of principle that the costs of the least efficient of the firms be averaged automatically into the rate structure. The unit cost approach constructs rates upon the basis of an examination of actual unit costs experienced by the several firms in connection with each species and in the light of the operating conditions of the firms. The construction of rates in this manner is more likely to result in rates "reasonable" to the patrons and the firms than rates selected to return in the aggregate revenues considered necessary to return the aggregate cost of rendering the service.

128. Consequently, we think we ought to follow the principles outlined in the 1931 order, namely, the unit cost methods. Before proceeding to do so, however, we shall first consider the questions of capital, capital costs and the volume of business to be considered in arriving at a rate schedule.

#### **V. Capital, Capital Costs, and Volume of Business**

##### **Market agency bonds**

129. There are set forth in Paragraph 113 hereof the reasons assigned by respondents for regarding the face amount of market agency bonds as capital on which a reasonable return should be allowed.

The procedure of obtaining a bond is that the agency selects a bonding company and makes application to it for a bond in the amount desired. The bonding company in turn requires a financial statement of the firm. If the assets are of sufficient amount to issue the bond, then that ends the procedure of application to get the bond. If the statement as shown is not of enough financial worth in itself to warrant the issuing of this bond, the personal surety of one or more of the members of the firm is required (T. 1634). The weakness of the position of the agencies is apparent from this. In the case of a respondent co-partnership which had sufficient assets to obtain a bond, these assets would be included by accountants in the capital on which a return would be allowed. In this connection respondents claim that \$303,313.29, representing market agency assets, should be considered as invested capital. The respondents' accountant, in addition to the \$303,313.29, included an amount equal to the face of the bonds and on the sum of the two he actually computed a return. If this procedure were followed, the rate payer would be paying a return on the capital actually in the business and on the face amount of bonds obtainable because the capital was in the business. This would be duplication.

130. If, however, the financial condition of the firm itself is such that a bond cannot be obtained, one or more of the owners are required by bonding companies to submit reports setting out their individual financial positions and to become personal sureties on the bond (T. 1634). If a partner owns a farm, for instance, or urban property, which makes him financially responsible to the extent of the amount of the bond, a bond is issued forthwith. The position of the agencies is that these properties which they continue to use and enjoy apart from the market agency business then becomes devoted to the conduct of the market agency business and should be considered capital on which a return should be allowed. This position is untenable. An individual who goes into any business of any kind incurs the risk that his personal assets, to the extent permitted by law, may be taken to satisfy his creditors. The personal property of the market agency owners may also be taken to the extent permitted by law by the consignor if there is no bond, by the bonding company to the extent of the bond if there is one, and by the consignor for the obligations in excess of the bond. The personally-owned property of the owners of a market agency may be taken for their default but it is no more devoted to the commission business when there is a bond than when there is not. Securities, even when deposited as collateral, in lieu of a surety bond, continue to earn their own return and are subject to the same liability as the personally owned real estate of the market agency owner.

131. Another reason why the amount of the bonds should not be included in capital is that the bonding of the agency is to give consignors assurance of the receipt of net proceeds and in event of default by the consignee market agency a convenient and expeditious method of recovery. The ultimate liability of an owner of a market agency is not affected by the fact that he has obtained a bond. If respondents' ultimate liability is not affected by the fact that they have obtained a surety bond, it would appear that respondents could become liable for a sum representing the total amount of shippers' proceeds in their custody which sum would be in excess of the \$1,415,000 bond coverage. On such a basis of liability respondents' so-called capital would approach the value of the entire plant and equipment of the Sioux City Stock Yards, which property is devoted daily to the rendition of stockyard service. Actually, experience has shown that during the past 20 years the market agencies at Sioux City have suffered little, if any, liability on account of these bonds. The face amounts of the bonds do not represent capital invested in the business and subject to the usual business risks incurred in business generally. Accordingly, it is concluded that the amount of these market agency bonds is not capital upon which a return should be allowed.

#### **Working capital requirements**

132. In Paragraph 112, *supra*, there is set forth a list of the items, amounting to \$303,313.29, which respondents contend constitute capital actually used in the market agency business. On this amount they say they should realize a reasonable return. The explanation given for including the sum of \$303,313.29 as capital for rate purposes is not convincing. Respondents contend, for example, that the sum of \$283,020.36, representing cash on deposit in banks, is needed to conduct their businesses. The fact of the matter is that the respondents are engaged in rendering services for others for which they are paid in cash. They collect their commissions daily, which assures a continuous inflow of cash. They periodically pay their employees whose wages constitute a major item of expense. Respondents, therefore, are paid by their consignors for the work done by their employees before they pay their employees for the work they do for consignors. With respect to the item of \$78,616.77 covering accounts receivable, no sound reason is shown why a business, which is primarily of a cash nature, should be allowed a return on such an item. With respect to the items of "Other current assets", "Equipment", and "Depreciation reserve" shown in Paragraph 112, such items will be discussed, *infra* (see Par. 215).

**Exchange memberships**

133. We have given a general description above of the activities of the Exchange. While some of its programs are of primary benefit to patrons, some tend to benefit primarily the members of the Exchange. Some of the \$84,074.86 represents memberships for employees of respondents. While we do not wish to limit the amount considered as capital for rate-making purposes to \$1,500 per firm as recommended by the Branch and the examiner, we do not believe the entire \$84,074 should be considered for these purposes in view of the factors mentioned. Accordingly, we have allowed \$2,400 per firm as described in Paragraph 217 hereinafter, thus allowing in effect approximately \$60,000.

**Return on capital**

134. In paragraphs 114 and 115, above, there are set forth the reasons why respondents contend that they should be allowed a return of 10 percent on all capital invested or otherwise required to be used in the market agency business. The Government offered testimony on the subject of rate return through Dr. Howard D. Dozier, an economist in the Livestock Branch, Production and Marketing Administration. Dr. Dozier has written extensively for various periodicals on the subject of financial investments and has testified on the subject of rate of return in practically all rate proceedings that have arisen under the Packers and Stockyards Act since its enactment in 1921.

135. For the most part, the owners of the market agencies have their own capital invested in their businesses and, consequently, do not have to borrow and pay interest. The interest rate which the agencies would actually have to pay on borrowed capital is therefore not ascertainable from their experience. The Government witness stated that, in his opinion, the Secretary would act fairly if he allowed a return of 6 to 6½ percent on the capital investments of all the market agencies. He stated that he thought this rate of return was as high as one could expect on a conservative investment in the Sioux City territory. In giving his opinion as to rate of return, the witness stated that he had not given effect to the risk of a possible decline in the volume of livestock received by the agencies for the reason that consideration of that factor had already been given effect in that such computations as had been made by the Government up to the time that he testified had been made on the assumption that the volume in 1948 would be less than it was in 1947. He pointed out that to increase the rate of return on capital to give effect to the risk of a decline in volume and then to give further effect to that decline by using volume figures considerably less than actual 1947 receipts in arriving

at a schedule of rates for the future would be to give effect to the same risk twice.

136. There was introduced through the witness Government Exhibit 18. In explaining the exhibit, the witness stated that it was designed to show the relative interest obtainable on various types of investments over a period of time since 1927, to show the trend of returns and the decline in the rates of interest. The yields shown on the exhibit are those realized on high-grade securities. The witness stated that none of the corporations listed on the exhibit was comparable to the business of the respondents and that the exhibit was not designed to indicate any particular rate of return. The exhibit was also designed to afford a means of ascertaining the precise yields which various securities allowed for each of the years studied. The data is for the years 1927 to 1947, inclusive. The exhibit shows that for the year 1947 the yields of 25 issues of public utility common stocks ranged from below  $4\frac{1}{2}$  percent to above 7 percent, with 18 of the issues having yields from  $4\frac{1}{2}$  to 7 percent. For the same year the yields on 103 issues of industrial common stocks ranged from below 4.5 percent to above 7 percent, with 56 issues having yields from 4.51 percent to 7 percent. The exhibit also shows that the yields on preferred stocks and on bonds of public utility and industrial corporations were considerably lower than the yields on common stocks.

137. The witness stated that he tested his opinion that the use of a 6 to  $6\frac{1}{2}$  percent return as a rate factor was reasonable by comparing this return with interest rates prevalent in the Sioux City territory, particularly those at which cattle loans were being made at the time of the hearing. He stated that he investigated the rates being charged on cattle loans at a number of the large central markets and at Sioux City. The evidence in this case shows that one of the partners in one of the respondent firms is connected also with a bank which makes loans to cattle feeders to the amount of about half a million dollars a year. When his bank takes a chattel mortgage on the cattle purchased with funds loaned by the bank, the interest rate charged is 5 percent per annum. If, however, the loan is secured by a good listed security instead of by a chattel mortgage, the rate charged by the bank is 4 percent per annum. If the loan is secured by Government bonds the rate of interest charged is  $2\frac{1}{2}$  or 3 percent. This bank also makes loans on urban real estate and on farms. The rate of interest on loans of this type is 4 percent. The Sioux City Feeder Corporation is a corporation whose stock is jointly owned by some of the respondent firms. The rate of interest charged on livestock loans made by this corporation is  $4\frac{1}{2}$  percent (T. 643). Loans of this type made by country bankers may be from 1 to 3 percent higher than the 4 percent

charged by this corporation. Based upon the yields of securities as disclosed by Exhibit 18 and upon the interest rates charged by various lending agencies at the Sioux City market and at other central markets, the witness concluded that a reasonable rate of return for the market agencies would be from 6 to 6½ percent.

138. Witness Spacek stated that the commission business was not comparable to any of the businesses listed in his exhibit, except that possibly the commission business was similar in some respects to the meat packing industry. Witness Dozier stated that the commission business was not similar to any business listed in his exhibit, but that the commission business was comparable to some extent to the agencies which made loans on cattle. It appears, however, that there are few corresponding risks as between the commission business and the meat packing industry, inasmuch as the latter has tremendous investments in plant and equipment, has huge inventories of meats, and obtains its livestock requirements by direct purchases as well as from purchases made at auctions and the central markets. The commission business at the stockyards is more comparable to the business of a stockyard company in that the prosperity of each is materially and directly affected by fluctuations in the volume of livestock handled, and each business requires comparatively little working capital. The only point of dissimilarity is that the stockyard company has a large investment in plant and equipment whereas the market agencies have little capital invested in plant and equipment. The rate of return allowed by the Secretary in connection with proceedings involving the rates and charges of stockyards has seldom exceeded 7 percent. In comparing the cost of obtaining capital for the conventional public utilities (such as those listed on Spacek's exhibit) with the cost of obtaining capital for the market agencies (assuming that the market agencies would attempt to obtain capital in that manner), it is essential that the total costs of all kinds of capital be compared, including borrowed, or secured capital. Witness Spacek did not do this. In his exhibit he set forth the returns on equity capital for various types of utilities but did not show the yields of bonds issued by such utilities, which yields are invariably much lower than the yields on stocks. The witness' conclusions as to rate of return for the market agencies are therefore based exclusively upon the returns realized on equity stocks of various classes of public utilities ranging from 10 to 30 percent. Respondents in their brief point out, with some merit, that it would not be fair to arrive at a rate of return based almost entirely upon local interest rates, such as rates on cattle loans. Also, as both witnesses stated, the commission business is not as safe an enterprise from a risk standpoint as the so-called "blue chip" companies listed on the exhibits



offered by both parties. On the other hand, the firms use their own capital and are in a position to protect their capital since they manage their own businesses. Both witnesses testified that the determination of a fair rate of return is largely a matter of judgment in that it is not susceptible of mathematical calculation. Giving consideration as best we can to all the factors involved, it is concluded that a rate of return of 7½ percent should be allowed herein.

139. Respondents seem to argue that there is something anomalous about the fact that the Government witness Dozier, who testified on the subject of rate of return, did not offer any testimony concerning the capital requirements of the market agencies; and that the Government witness Bufkin, who testified with respect to the capital requirements of the market agencies, did not offer any testimony as to the rate of return (Respondents' Brief, pp. 190, 199). Respondents point out that witness Spacek who testified on both subjects based his conclusions as to capital requirements on a broad study of financial conditions relating to the money market for small businesses and upon his understanding of the peculiar capital requirements of the market agencies. The answer to this seems to be that no particular virtue attaches to having one witness testify on both subjects especially since the Government took the position at the hearing and in its brief that the respondents are entitled to no allowance for capital beyond its working capital requirements and investments in fixed property actually used and employed in the business. Accordingly, witness Dozier expressly limited his testimony to the subject of rate of return and witness Bufkin limited his testimony to the Government's theory of what constituted adequate working capital requirements for the market agencies.

#### **Volume of business**

140. Arnold V. Nordquist offered testimony for the Branch concerning the supplies of livestock in the areas from which the Sioux City stockyard obtains its receipts of livestock. Witness Nordquist is in charge of the Division of Livestock and Poultry Statistics, Bureau of Agricultural Economics, U. S. Department of Agriculture. Through this witness the Government introduced Exhibit 19. Table 1 of the exhibit shows the numbers of livestock in specified areas tributary to the Sioux City stockyard. Table 2 shows hog inventory numbers, the pig crop, and marketings of the four states which supply Sioux City with the bulk of its hog receipts. Table 3, covering cattle and calves, furnishes similar information with respect to the seven states which supply Sioux City with the bulk of its cattle and calf receipts. Table 4, covering sheep, furnishes similar information with respect to the nine states which supply Sioux City with the bulk of

its sheep receipts. Tables 5, 6, 7 and 8 show a comparison of livestock receipts at Sioux City with receipts at seven other markets (some of them competing markets), with the total receipts of all markets, and with inspected slaughter. Table 9 shows a comparison of cattle numbers on feed as of January 1 in five states with receipts at the Sioux City market for the period 1934-1948, inclusive. Table 10 shows the number of inspected fed cattle shipped from eight important stockyards and the total for all stockyards from 1934 to 1947. Table 11 shows the number of direct shipments of stocker and feeder cattle into eight corn belt states for the period 1939 to 1947, inclusive. Tables 12 and 13 furnish similar information with respect to sheep.

141. According to the information shown on the foregoing tables, Iowa, Nebraska, South Dakota and Minnesota contribute 95 percent of the total receipts of hogs at the Sioux City stockyard, 86 percent of the total receipts of cattle, 65 percent of the total receipts of calves, and 66 percent of the total receipts of sheep and lambs. North Dakota, Montana and Wyoming contribute 7 percent of the total receipts of cattle and 13 percent of the total receipts of sheep and lambs. The average percentage of sheep and lambs from Idaho and Colorado amounted to 10 percent.

142. Witness Nordquist, interpreting the data contained in the exhibit, testified as follows. Receipts of all species at the Sioux City stockyard have been fairly well maintained in relation to numbers and production in the supply area as a whole. The proportion that Sioux City receipts are of total marketings has held up fairly well. In fact, for cattle and sheep, some gain in the proportion marketed at Sioux City is shown for the past five years. The high prices prevailing for livestock and feed grains have had the effect of increasing marketings, reducing inventories, and limiting feeding activities. The corn crop was relatively short in 1947. This together with high prices for corn contributed to the reduction in feeding and in the number of sows bred for farrowing in the spring of 1948. On the downward phase of the cycle in numbers, marketings are heavy in relation to inventories. Stock sheep numbers have about reached the low point in the cycle but cattle numbers are expected to decline further, especially if high prices prevail for another year or so. With national income at an all-time high, demand for meat is expected to remain strong and prices should be attractive, especially to the producers of feeder cattle and lambs. With an average corn crop in 1948, and a reduced supply of hogs, prices of hogs should move into a more favorable relationship with corn prices, and an increase in hog production can be expected. An increase, however, is not likely to be reflected in increased receipts or slaughter until the last half

of 1949. For the supply area as a whole, the feed and pasture resources for cattle and sheep are potentially greater than prior to 1939. This results from the increased use of hybrid corn and the steady and significant decline in the population of horses and mules.

143. Beginning in 1938, hog numbers started upward and reached a peak in 1944. Over this period the receipts at the Sioux City stockyard have tended to follow rather closely the changes in the numbers and production in the supply area. Sioux City receipts as a percentage of the numbers on farms or the pig crop for the four States have changed but little. Nor has there been any marked tendency for the proportion of total market receipts going to the Sioux City stockyard to decline. Table 2 shows that the hog population for the four States decreased on January 1, 1948, which indicates that 1948 receipts will be smaller than 1947. The number on farms on January 1, 1947, was 18,296,000. On January 1, 1948, the number declined to 17,056,000. A decrease in spring farrowings is forecast for the 1948 spring crop, which means that the decline in hog numbers will continue in 1949. With average conditions, this area is capable of producing more grain than was the case prior to 1939. It would be expected, therefore, that after the present cycle has run its course, hog production in the supply area will increase to a level at least as large as prevailed over the average of the past ten years.

#### **Cattle**

144. Table 6 shows the record of receipts at the Sioux City stockyard for the past 14 years. After the heavy receipts of 1934 and 1936, receipts fell off as a general increase in inventories began. Receipts started to increase as cattle production increased in the supply area. Heavy receipts were experienced when numbers reached the peak in 1945. The decline in inventories which followed resulted in a continued heavy volume of cattle marketings from the area. Table 6 shows the Sioux City stockyard to be in a relatively more favorable position than other mid-western markets. It shows a larger percentage increase than for all markets.

145. Since about one-sixth of the cattle marketings from Iowa go to the Sioux City yards, the trends in cattle numbers and production in Iowa are of major importance. Iowa inventories of cattle have been decreasing since 1945, the drop in 1947 being about 9 percent. A further decrease can be expected. Thus marketings should be relatively heavy in relation to inventories. Decreases should continue for another two or three years after which numbers will stabilize and start upward again. Expectations are that with more abundant supplies of corn cattle feeding should show some increase from the 1948 level. The outlook for relatively large marketings from Ne-

braska is good, since inventory numbers in this State have decreased only 7 percent since 1945. The population of steers and calves on January 1, 1948, is considerably larger than in the period 1939-1943. A sharp decrease in numbers of cattle on feed January 1, 1948, will reduce marketings in the first five months of the year below 1947, but the relatively heavy production rate of calves, together with a further decline in inventories should maintain fairly heavy marketings from this State. Equally good, if not better, is the outlook for large marketings from South Dakota. Since reaching the peak in 1945, cattle inventories have declined but 2 percent. The beef heifer and calf population is at a record high, and the number of steers are nearly twice the average number for 1939-1943. Over 40 percent of the South Dakota marketings went to Sioux City in the period 1944 to 1947, as compared with about 32 percent, the average for the period 1939 to 1943. Receipts at Sioux City from the other four States in the supply area will probably show a varied trend. Those from North Dakota will be down substantially from the average of the last four years. Marketings from Minnesota can be expected to be well maintained, which is also the case for Montana. Presumably the market can count on about average receipts from Wyoming.

146. Table 10 shows the feeder cattle inspected at Sioux City and at seven other markets. Except for Ogden and Denver, the increase in the numbers inspected at Sioux City during the past four years is the highest for any market. It is higher also than the increase shown for the eight important stockyards and for all stockyards. Table 11 shows the direct shipment of stocker and feeder cattle into eight corn-belt States from the feeder cattle producing States in the supply area. This table shows that during the past four years the direct shipments from the supply area have also increased but relatively not as much as the feeder movement from the Sioux City stockyard.

147. In summarizing the situation as to marketings of cattle from the supply area for the next few years, it appears that the volume will be somewhat less than the near record marketings in 1947, but will remain fairly heavy and much above the average for 1939-1943. The decrease in 1948 marketings will be relatively more pronounced in the first five months of the year when fewer fed cattle will be marketed from the area. Marketings are heavier in relation to numbers of cattle on feed January 1 in years when inventory numbers of all cattle and calves are decreasing than is the case when inventories are increasing. Marketings during the January-May period in 1948 are expected to run relatively heavy in relation to the number of cattle on feed since cattle inventories in Iowa and Nebraska continue

to decline. With larger feed supplies possible, barring drought or other misfortune, cattle feeding in the next few years can be expected to increase from the 1948 level. This will tend to maintain the volume in the first half of the year but it is very unlikely that increased marketings of fat cattle will push the volume higher than in 1947. Marketings in the last half of the year in 1948 and the next few years should be fairly heavy and much above the 1939-1943 average.

#### **Calves**

148. The number of calves received at the Sioux City stockyard has increased in the past four years and has been well above average. The situation with respect to marketing the calves is somewhat similar to cattle, but marketings cannot be predicted with any degree of certainty. A decrease in marketings would be expected from Iowa and especially from North Dakota. Iowa contributed about 17 percent of the Sioux City receipts during the 1939-1943 period. Nearly half of the calves at Sioux City originated in Nebraska and South Dakota. Marketings from these two states should be at least as large as in 1947 when they were relatively small in relation to inventories and the calf crop. Montana and Wyoming should market about as many as last year. Market receipts of calves from the supply area could vary considerably from last year. It is not beyond the realm of possibility that an increase could occur, although at present some decrease seems likely.

#### **Sheep**

149. After the 1936 drought, sheep receipts began to increase at the Sioux City market in line with the increase in numbers and the lamb crop in the supply area. Sheep numbers in the area began levelling off in 1942 and turned downward thereafter, recording rather sharp annual decreases. The effect of the change to the downward phase of the sheep cycle was to increase marketings as inventories were liquidated. Since 1942, numbers have declined until the population on January 1, 1948, was the smallest since 1929. In view of the present situation, it seems likely that marketings of sheep and lambs in the supply area in 1948 will be materially below 1947. Prospects for the next few years do not hold promise for an increase. With some tendency for the decline in sheep numbers to stop, it is expected that marketings in the next few years from the supply area will be well below the five-year average for the 1934-1938 period and far below the peak marketings of 1942-1946.

150. Witness Nordquist was asked to comment on Respondents' Exhibit 26 which relates to the decline in the number of cattle and calves on feed as of January 1, 1948. The exhibit shows that the number for Minnesota was down 15 percent, the number for North Dakota was down 16 percent, the number for South Dakota was down 20 per-

cent, and the number for Nebraska was down 20 percent. The witness testified that the exhibit, which is a release of the U. S. Department of Agriculture, shows a decline in the number of cattle on feed only, and represents an indication of decreased marketings principally for the period from January through May, that numbers are on the decrease and, therefore, there will be continued marketings of cows and liquidations as far as inventories go, and that the total marketings should not be estimated on the basis of fed cattle only but should also include slaughter and other types of cattle. Accordingly, the witness was of the opinion that respondents' estimate of a 19 percent decrease in cattle marketings was not justified.

151. Similarly, with respect to hogs, the witness stated that respondents' estimate of a decline in hog receipts of 14.4 percent was not justified because it was based on breeding intentions related to the number of sows farrowed in the spring of 1948, the pig crop of which will start to market in October 1948 and will be marketed almost fully in 1949. The witness stated that, in his opinion, the best indication of hog marketings for the first nine months of 1948 would be the change in the number of hogs on farms January 1, 1948, from January 1, 1947 (T. 1870). Accordingly, on the basis thereof the witness was of the opinion that the decline in hog marketings would be closer to 7 percent than 14.4 percent.

152. Both witnesses who testified as to anticipated receipts for 1948 agreed that sheep marketings would be down 18 percent.

153. The forecasting by the Branch's witness and by respondents' witnesses was done at the time of the hearing in April and May, 1948. Respondents' estimates of declines in receipts were for the year 1948 as compared with 1947. The Branch's witness spoke in more general terms, that is, with respect to conditions in the supply area for the next few years. Of course the year 1948 has elapsed and, in addition, the year 1949. This considerable time lag between the closing of the hearing and the issuance of this final decision and order is due in part to the numerous controversial issues. It is unfortunate that the time lag should be so long and that the record evidence is not more current as to actual and prospective receipts of livestock. In any event, we do not believe that we should restrict ourselves to anticipated business for one year which is about what respondents did in estimating declines in receipts for 1948 as compared with 1947. The task here is to arrive at a schedule of reasonable rates for a future period greater than one year. Moreover, we think it appropriate to look at official publications of the Department issued since the close of the hearing to take cognizance, in a general way at least, of matters that are now within the realm of public knowledge.

154. In connection with prospective volume of hog receipts we do not believe that we should consider a figure less than the 1947 marketings. On the contrary, the "Pig Crop Report" issued by the Department on December 21, 1949, shows considerable increases in production nationally and in the supply area for the Sioux City market for 1949 over 1948, with indications of further increases in 1950. Hog production nationally and in the supply area for Sioux City was higher in 1949 than 1947 and is indicated to be still higher in 1950.

155. With respect to what volume of cattle and calf receipts should be taken into consideration, we think more attention should be paid to factors covering several years rather than what might be the situation for one year. The Branch estimated a decline of 6 or 7 percent from 1947 cattle and calf receipts. Respondents held out for a 19 percent decline. The examiner recommended a 12 percent decline figure. We think that for our purposes here we should not anticipate more than a 7 percent decline from 1947 cattle and calf receipts. "The Livestock and Meat Situation" issued by the Department in October 1949 shows that cattle numbers on farms appear to be increasing, the downtrend in numbers commencing in 1945 having been broken according to "Livestock on Farms January 1" issued February 16, 1949, by the Department, which reported a 0.5 percent increase in numbers of cattle and calves on farms on January 1, 1949, as compared with January 1, 1948. "The Livestock and Meat Situation" indicates that, due to large supplies of corn and other grains at low prices in relation to cattle prices, numbers of grain-fed cattle will continue high, with as much as a 23 percent increase in the Corn Belt in 1949 over 1948. It is largely upon the cattle-on-feed figures issued in 1948 that respondents estimated their 19 percent decline in cattle marketings.

156. Although it is not necessary to take official notice of respondents' reports to the Department in this connection, we have looked at them for the years 1948 and 1949, and these reports show in general that hog receipts for the last two years have exceeded the 1947 hog receipts and that, although there was a decline in cattle and calf receipts in 1948 greater than expectations, much if not all of the decline was made up in 1949.<sup>1</sup>

157. As far as sheep and lamb receipts are concerned, the 18 percent decline apparently agreed to by the parties and recommended by the examiner is adopted.

<sup>1</sup> Insofar as we have looked at these reports for this purpose, this in a sense constitutes a granting of the motion of the Branch that official notice be taken of these reports. However, they were used only for this limited purpose and merely corroborate what is shown by the later issues of the same Department publications used by respondents at the hearing. Any dispute by respondents may become the subject of a petition for reconsideration.

**VI. Reasonable Per Head Unit Costs**

158. Prior to the hearing, the Government made cost studies of the market agencies' operations for the year 1947. The data obtained from respondents' books and records and from their quarterly reports afforded a basis for determining the per head costs. The audit material presented by the Government was offered through Harold E. Bufkin, an accountant of the Packers and Stockyards Division, Live-stock Branch. Witness Bufkin has had specialized accountancy training and experience in various lines of business and has been employed as an accountant in the Packers and Stockyards Division since 1924. He has testified in a large number of rate proceedings that have arisen under the Packers and Stockyards Act.

159. Government Exhibit 20 was offered in evidence to show the operating income and expenses and adjustments thereof for rate purposes. The data shown therein were obtained from the quarterly reports filed by the market agencies. Page 1 of the exhibit shows the gross income, total expenses exclusive of owners' salaries, and the net return to the 25 respondents for the years 1943 to 1947, inclusive, as follows:

Year	Gross income	Expenses, exclusive of owners' salaries	Net return to owners
1943.....	\$1, 485, 851 88	\$1, 076, 004 71	\$409, 857 17
1944.....	1, 629, 023 67	1, 199, 996 95	429, 026 72
1945.....	1, 469, 679 86	1, 138, 634 27	331, 045 59
1946.....	1, 630, 135 99	1, 188, 445 35	441, 690 64
1947.....	1, 728, 048 96	1, 316, 438 50	411, 610 46

160. On page 2 of the exhibit is shown a summary of expenses for 1947 for the 12 representative market agencies as adjusted by the accountant for rate purposes. It shows two basic expenses, namely "Non-Owners' Salaries" and "Other Expenses." These two expenses are further broken down into particular types of costs. "Non-Owners' Salaries" is divided into expenses attributable to cattle selling, hog selling, sheep selling, soliciting, manager, office, cattle yarding, hog yarding and sheep yarding. "Other Expenses" is divided into business getting, office, administrative and general, yard supplies and expenses, hog yard expenses and cattle yard expenses. The accountant added to total expenses an allowance for depreciation on certain fixed assets and deducted from total expenses such items as owners' salaries, donations, rate case expense, state and Federal income taxes, and personal insurance. The resulting adjusted figures were stated to be the total out-of-pocket costs applicable to the operations of the 12 representative market agencies. Some of respondents' expenses were reclassified by the Government accountant.



161. On page 3 of the exhibit are shown the per head revenues by species derived by the 12 representative market agencies from the rates in effect in 1947 and from the higher rates in effect during the first quarter of 1948.

162. On page 4 of the exhibit are shown, by species, the number of head of livestock sold, bought and resold by the 12 representative market agencies during 1947, the number of consignments, drafts, account sales, account purchases, number of owners of the livestock handled, commission and extra charges, and the revenues per head of livestock.

163. On pages 5 and 6 of the exhibit is shown a detailed statement of the expenses of the 12 firms for 1947, "as adjusted for tax purposes," reduced to per head unit costs (exclusive of expenses reported by the firms for "business getting" and "salesmanship" and with no allowance for interest on invested capital). Thus, per head unit costs, by species, are shown for managers' salaries, yarding expense, office expense, and administrative and general expense. In distributing costs to the various functions, direct expenses as found on the books were charged directly to the function. Thus, the salary of a hog yard man would be a direct charge to yarding hogs. Indirect expenses, such as office expenses and managers' salaries, were distributed on the basis of a number of drafts issued or accounts sales and purchases rendered. For example, the per head unit costs for manager's salary, yarding expense, office expense, and administrative and general expense for the firm of John Clay & Company are as follows:

	Cattle and calves	Hogs	Sheep
Manager's salary.....	\$0 0503	\$0 0260	\$0 0058
Yarding expense.....	.1217	.0454	.0235
Office expense.....	.1067	.0552	.0124
Administrative and general expense.....	.0363	.0188	.0042

164. Page 7 of the exhibit contains a recapitulation of the per head unit costs shown on pages 5 and 6 of the exhibit. Page 8 is a summary of income and expenses for the 12 firms for the first quarter of 1948 and shows the number of owners in each firm and their primary duties.

165. Government Exhibit 23 apparently was offered for the purpose of arriving at the per unit allowance for business getting and maintaining, by species, of those firms which had employed salesmen in 1947 and the first quarter of 1948; in other words, the owners of such firms employed others to perform the function of buying and selling livestock. To arrive at such per unit costs, the accountant

totalled the unit costs heretofore referred to for yarding, office expense, managers' salaries, and administrative and general; added thereto the unit costs of non-owners' selling expense; and applied  $\frac{1}{9}$  of the sum in order to obtain "ten percent of that total." The resulting figure was described as an appropriate unit allowance for the item of business getting and maintaining. The witness testified that the foregoing was the method used by the Secretary in all prior commission rate proceedings in determining an allowance for business getting and maintaining. However, it appears that the Government did not see fit to apply such a method in this proceeding since in its suggested findings, conclusions and order, the Government applied a different method and arrived at an allowance for the item by setting out all expenditures for business getting and maintaining on a per head basis as to each species (see Par. 67 *et seq.* of that document). In allocating such expenditures as between species, the method used was the ratio which the gross selling and buying revenues received in 1947 from each species bore to the total selling and buying revenues.

166. Government Exhibit 21 is a statement of the investment in fixed assets of the 12 firms as of December 31, 1947, and reflects the book value of office fixtures and equipment and automobiles.

167. Government Exhibit 22 is a statement showing an allowance for working capital requirements of the 12 firms. This allowance was arrived at by deducting the depreciation expenses from the total adjusted expenses shown on page 2 of Exhibit 20 and taking  $\frac{1}{12}$  of the balance. The resulting figures, according to the Government accountant, represents an allowance for one month's operating expenses (exclusive of depreciation) which he recommended as sufficient for working capital. He stated that the respondents obtain their revenues daily in cash and therefore the allowance was sufficient to pay all of their expenses that are due in advance of the period used, such as rent, etc.

168. Government Exhibit 25 shows the per head unit costs by species (exclusive of business getting and maintaining expense, salesmanship expenses, and interest on invested capital) for 1947 for the Producers Commission Association, as follows:

	Cattle and calves	Hogs	Sheep
Manager's salary.....	\$0 0409	\$0 0259	\$0 0054
Yarding expenses.....	1231	.0536	.0182
Office expenses.....	0981	.0622	.0131
Administrative and general expense.....	0973	.0617	.0129
Total unit costs.....	3594	2034	.0496
Number of head.....	110, 305	91, 330	108, 221

169. Government Exhibit 27 is a statement showing employees' salaries paid by all market agencies for 1947 and the first quarter of 1948.

170. Based upon the figures and information contained in the foregoing exhibits offered by the Government and in the quarterly reports, it is possible to determine the per unit costs for the various categories of expenses comprising respondents' total costs of doing business. As we have seen, the per unit costs for Yarding Salaries and Yard Expenses, Office Salaries and Expenses, and Administrative and General Expenses are set forth in Government Exhibit 20, page 5. For a list of all such categories of expenses, see Paragraph 174.

171. It was stipulated at the time of the hearing that the experience of 12 named firms might be taken as typical of the experience of all the agencies operating on the market, but it was agreed at the same time that this would not preclude resort to the experience of any other or all other agencies. Because of the importance of volume on revenues, the Government introduced a cost study of the Producers Commission Association, a cooperative organization handling large volume, in addition to that of the 12 stipulated firms. Official notice was taken of the quarterly reports which have been filed with the Secretary of Agriculture by all the agencies from 1943 to 1947, inclusive. These reports reflect information contained in the original books and records of the agencies. The agencies submitted with their petition of July 31, 1947, statistical information with respect to costs and other matters with respect to six firms of their own selection. At the time of the hearing some of this information was brought up to date. The six firms used by the agencies are included among the twelve as to which the stipulation was entered.

172. For the purpose of arriving at some of the reasonable unit costs to be covered into the rates hereafter found to be reasonable and non-discriminatory for all firms, the experience of these twelve firms, including the six used by the agencies, has been considered. Resort has been had to the experience of the other firms also, particularly to that of the Producers Commission Association.

173. In order to determine per head costs as nearly current as possible, the year 1947 has been used as the test period. The experience of this year has been compared generally with that of the previous years 1943 to 1946, inclusive, for which the respondents filed quarterly reports. In arriving at the reasonable per head costs to be covered into reasonable rates, consideration will be given to these unit costs, to forecasts of probable receipts, and to actions already taken by some of the agencies resulting in increased expenses.

174. In submitting their quarterly reports to the Secretary of Agriculture, the respondents list their expenses under some 60-odd different headings. In arriving at a reasonable unit cost a smaller number of categories of expense has been established, and in these there have been assembled such of the separate items as seem logically to fall in the fewer and more general categories. For purposes here the following categories of expense have been adopted :

1. Yarding Salaries and Yard Expenses
2. Office Salaries and Expenses
3. Administrative and General Expenses
4. Business Getting and Maintaining
5. Salesmanship
6. Return on Capital
7. Profit to Cover Management and Uninsurable Risks of the Business

175. In keeping their books and records and in making their quarterly reports to the Secretary, it is the custom of the agencies to denominate employees in accordance with the principal work done. If an employee does yarding mainly but has reached the point where he may do a little selling of odd head of lower grade livestock, the agencies generally list him as a yardman of that species to which he principally devotes himself. In a few instances in which a firm lists two salesmen of one species and no yardman of that species, it has been necessary to show unit cost of salesmanship and unit cost of yarding together. This is a reasonable procedure and productive of a more dependable conclusion than would be an allocation made on the basis of the time an employee devotes to each of his duties, even if it were possible, as it is not, to determine the portion of his time devoted to his various duties. This method of allocation has been used in the past by the Secretary in the proceedings involving the market agencies at Kansas City and Chicago, P&S Dockets Nos. 311 and 402, and is followed here. The various categories of expenses listed in Paragraph 174 will be taken up, *seriatim*, herewith.

#### **Yarding salaries and vard expenses**

176. By far the larger part of this item of expense is on account of salaries, which can be allocated directly to each of the species. There is a small amount of additional expense attributable to yard incidents, such as sweaters and boots furnished by the agencies to their employees, slappers, and other items of small cost. These costs, small though they are, are occasioned by all species jointly. Hence some appropriate method of allocating them must be adopted. Practically

all the yard work of handling the animals by the agencies culminates in the weighing of them. According to the custom of the market, title passes when an animal is weighed at the scales. Animals are handled largely in drafts, of which scale tickets are the record. The amount of work which has to be done in handling the animals as they progress step by step through the marketing machinery depends on the number of drafts. The ratio of the number of drafts for each species to the number of drafts of all species is a reliable guide by which to apportion the indirect yarding expenses incident to the handling of each species. In allocating yard expenses included in this category of expenses a percentage has been applied to total expenses on account of this function. The percentage is obtained by dividing the number of drafts generated by one species by the number of drafts generated by all species. When the methods of allocation discussed above are applied, the following results emerge as to each species with respect to each of the 12 representative firms and to the Producers Commission Association :

Name of firm	Cattle and calves (cents per head)	Hogs (cents per head)	Sheep (cents per head)	Name of firm	Cattle and calves (cents per head)	Hogs (cents per head)	Sheep (cents per head)
Carpenter.....	14 07	2 71	0 14	Mid-West.....	20 77	6 52	4 67
John Clay.....	12 17	4 54	2 35	Producers.....	12 31	5 36	1 82
Farmers Union.....	18 16	3 16	. 11	Rice.....	15 97	4 00	. 05
Hudson-Coe.....	12 77	. 03	. 01	Frank E. Scott.....	11 69	6 82	. 05
Ingwersen.....	7 84	3 94	. 11	Steele-Siman.....	12 37	5 36	. 01
Lee.....	15 20	2 35	. 01	Wagner.....	19 05	4 56	. 04
Long & Hansen.....	8 28	2 49	. 09				

NOTE.—The above per head unit costs are shown on Government exhibits 20 and 25.

177. It will be observed that there is considerable variation in the per head costs for this item shown for each of the firms. Some are high and some are low. The highest per head cost for cattle and calves shown is 20.77 cents. The next highest per head cost is 19.05 cents. Such per head costs are much out of line with the per head costs of other firms. The lowest per head cost is 7.84 cents incurred by a firm in which there are a number of owners with relatively few employees. Each owner, though a salesman or performing other work, turns his hand to whatever is to be done, including yarding, and thus reduces the out-of-pocket expense. This figure is below what normally can be expected. Another firm shows a per head yarding cost of 8.28 cents. For a part of the year 1947, this firm did not maintain its normal quota of cattle yardmen. The per head cost is lower than can generally be expected. In the case of other firms whose unit costs seem to be out of line, there are peculiar conditions not applicable to other firms

operating under more normal conditions. The conditions which account for the variations disclosed in connection with yarding of cattle exist also in connection with the yarding of hogs. Most of the firms do not maintain a sheep department of their own, but turn over the sheep consigned to them to one or another of the firms maintaining sheep departments to be handled and sold by them. For this reason, as stated above, the Government introduced Exhibit 25 showing the experience of the Producers Commission Association, which is one of the respondents but not one of the 12 selected representative firms. It does have, however, a large sheep business and does not handle any sheep on a split commission basis. Consideration of its experience in handling sheep is necessary in order to arrive at reasonable per head costs for sheep. Only two of the firms have employed full time yardmen who devote themselves to yarding this species. In the case of the other firms, the salesmen do the yarding as well as selling, with some extra yarding help temporarily employed from time to time. The experience of these firms constitutes the best guide as to what is a reasonable per head cost.

178. On the basis of the facts of record and the testimony and after giving full consideration to the forecasts of probable receipts and to anticipated increased operating expenses, it is found that the following are fair and reasonable amounts to be covered into rates on the three species on account of Yarding Salaries and Yarding Expenses:

Cattle-----	15.0 cents per head
Hogs-----	5.0 cents per head
Sheep-----	2.5 cents per head

#### **Office salaries and expenses**

179. It is not possible to identify those portions of office work generated by the handling of each of the species. Office salaries and office expenses have to be allocated therefore on some reasonable basis. The office force handles the scale tickets on which are reported the weights and prices obtained for each of the species. The amount of work done in the office varies also with the number of owners who consign cattle, hogs and sheep. It is the custom of some firms to make an account of sale for each owner for each species on which are set out the price, weight and charges of various sorts assessed against each species. That is to say, one owner may receive more than one account of sale when his commission agent reports the results of the sale of his livestock of more than one species. The number of entries on the accounts of sale varies proportionately to the number of drafts.

180. In arriving at the reasonable per head costs incident to office salaries and office expenses set out below, all these factors have been given weight. The percentage which has been applied against the

total amount of office salaries and office expenses in determining how much should be allocated to each species has been arrived at by dividing the number of accounts of sales, plus the number of owners and drafts applicable to one species, by the total number of accounts of sales, owners and drafts applicable to all species combined. The various percentages so obtained have been applied against the total amount of office salaries and expenses. The amount so attributed to each species handled by each firm has then been divided by the number of head of that species and the quotient considered as the per head cost to that firm in getting the office work attributable to the species done.

181. The following table gives the result of this method of allocation and computation for each species of livestock handled by each of 13 firms:

Name of firm	Cattle and calves (cents per head)	Hogs (cents per head)	Sheep (cents per head)	Name of firm	Cattle and calves (cents per head)	Hogs (cents per head)	Sheep (cents per head)
Carpenter.....	8 83	4 26	2 27	Mid-West.....	20 80	8 12	2 00
John Clay.....	10 67	5 52	1 24	Producers.....	9 81	6 22	1 31
Farmers Union.....	17 93	5 37	2 09	Rice.....	12 75	5 30	1 76
Hudson-Coe.....	10 82	4 88	1 03	Frank E. Scott.....	11 51	4 10	3 60
Ingwersen.....	7 92	4 54	3 51	Steele-Siman.....	8 24	3 87	1 27
Lee.....	14 51	6 19	3 32	Wagner.....	16 05	6 22	1 90
Long & Hansen.....	8 83	4 32	2 83				

NOTE.—The above per head unit costs are shown on Government Exhibit 20, p. 5, and Government Exhibit 25.

182. Owners do office work in three of the firms, Long & Hansen, Mid-West and Steele-Siman. Some of the office workers in Long & Hansen and in Mid-West are owners and the salaries paid them are, therefore, without significance as to this item of per unit expense. The owner-office worker in Steele-Siman draws no salary but he shares whatever is left after out-of-pocket expenses are met.

183. In the conclusions drawn as to reasonable per head costs on account of office salaries and office expenses, the experience of these firms has been ascertained but for the reason stated has been given little weight. In some of the other firms in which there are several owners, the number of office employees is small, which indicates that the owners help out in the office thus reducing to a sub-normal amount the out-of-pocket costs of getting office work done. The per head costs to such firms for office salaries and office expenses are lower than can be considered as reasonable and normal in arriving at the per head costs which should be considered in arriving at reasonable rates.

184. In the light of the conditions under which costs incident to office salaries and expenses are incurred by the market agencies and on the basis of all the testimony relative to increased expenses in the

future and taking into consideration future volume of business, it is found that the following are reasonable per head amounts to be covered into rates on account of Office Salaries and Expenses:

Cattle and calves.....	14. 0 cents per head
Hogs.....	5. 5 cents per head
Sheep.....	2. 5 cents per head

**Administrative and general expenses**

185. The third general heading under which may be grouped a number of costs is "Administrative and General Expenses." Expenses included under this heading are annually recurring expenses, but these are smaller in amount and need not be segregated and discussed separately. The items grouped in this category are Exchange assessments and dues, telephone and telegraph expenses, legal and auditing fees, meals for employees who work at unusual hours, clearing house expense, workmen's compensation insurance, mortgage and theft insurance, surety bond expense, net loss in estray accounts, bookkeeping errors and adjustments, those gifts and donations which tend to benefit employees and improve employer-employee relations, social security taxes, taxes on personal property used in the business, and costs of rate hearing. For the most part these items have been included in the amounts revealed on the books and records of the agencies.

186. A question was raised at the hearing as to the extent, if any, gifts, donations and the like made by the agencies should be included in expenses and passed on to patrons in the rates they pay. This question has been presented in every rate case which has arisen under the Packers and Stockyards Act. The procedure followed in all these cases has been to include those gifts and donations which tend to improve the morale of workers or to promote harmonious employer-employee relationships and to exclude all those of a general nature which benefitted the communities in which the agencies lived. Examples of excluded expenses are: donations to the Red Cross, American Cancer Society, Sioux City Community Fund, United Jewish Appeal, American Legion, Y. M. C. A., Salvation Army, Morningside College, Sioux City Chamber of Commerce, and to various churches. These donations should be borne by the agencies since they determine whether to make them, how much to give, and since their own community benefits through them. The procedure of disallowing this type of expense has been followed in all other commission rate cases, has been sanctioned by the courts, and is followed in this proceeding.

187. Administrative and general expenses are incurred in connection with all species of livestock jointly and have to be allocated to the



three species on some reasonable basis. Allocation of these expenses to species on the basis of accounts of sales, owners, and drafts seems the most generally applicable, and has been adopted. The following table gives the per head amounts resulting from this method of allocation for the firms listed:

Name of firm	Cattle and calves (cents per head)	Hogs (cents per head)	Sheep (cents per head)	Name of firm	Cattle and calves (cents per head)	Hogs (cents per head)	Sheep (cents per head)
Carpenter.....	4.47	2.15	1.09	Mid-West.....	3.75	1.46	0.36
John Clay.....	3.63	1.88	.42	Rice.....	4.72	1.96	.65
Farmers Union.....	5.78	1.74	.68	Frank E. Scott.....	4.03	1.43	1.26
Hudson-Coe.....	2.91	1.29	.28	Steele-Siman.....	2.72	1.29	.42
Ingwersen.....	2.74	1.57	1.21	Wagner.....	5.18	2.01	.61
Lee.....	4.31	1.84	.98	Producers.....	9.73	6.17	1.29
Long & Hansen.....	4.78	2.33	1.53				

NOTE.—The above per head unit costs are shown on Government Exhibit 20, p. 5, and Government Exhibit 25.

188. It will be observed that as to cattle and calves and hogs the two cooperative agencies' costs per head are much above the costs for most of the other firms. The cooperatives stand in a peculiar position in that they are members of a general association and contribute to its support. To cover into reasonable costs per head amounts as large as those shown for the cooperatives would pass on to all patrons costs peculiar to the cooperative firms. It is not fair and reasonable to pass on to all patrons costs which result in special benefits accruing to members of the cooperatives only. Some of the other firms have comparatively low per head costs. This results from exceptionally heavy volume over which to spread the expense.

189. This proceeding was originally initiated in 1930 by the Secretary of Agriculture on his own motion. The rates prescribed in the original order have been modified from time to time on petition of the agencies without the holding of a hearing. The petition of October 31, 1947, was of such a character that the Secretary felt he would not be justified in passing on it without a hearing. The question now arises as to whether the cost of the hearing should be covered into rates and thus be borne by the patrons of the agencies or whether the cost of the hearing should be borne by the agencies themselves. In view of the fact that seventeen years have elapsed since the prior hearing, a reasonable cost for the hearing should be covered into the rates and be borne by the users of the services provided by the agencies.

190. The accountant called by the Government eliminated from his computations all costs of the hearing incurred since 1947 for the reason that the hearing had not been completed and he had no way of estimating what the probable total cost would be. It was his opinion that

when the total cost was determined, it should be amortized over a reasonable period of time. The accountant for the Exchange included in his aggregate figures costs incident to the hearing incurred up to that time. One of the other accountants called by the market agencies testified that he thought \$15,000 a year ought to be included in aggregate costs. In his computations he used this figure, but testified that his results should be revised downward to the extent of \$10,000 because the other accountant had already included the \$10,000 (T. 1552). The essence of respondents' testimony is that there should be covered into the rates, however arrived at, \$15,000 a year to provide for (1) rate studies of a type said not to be available up to now and (2) expenses incident to this proceeding. Two trained men at \$5,000 and \$4,000 a year, respectively, account for \$9,000 with the remaining \$6,000, over a period of years, to cover the cost of this proceeding.

191. The expenses incident to the preparation of the quarterly reports filed with the Secretary are reflected in the general and administrative expenses considered here for rate purposes. The materials in these reports to some extent constitute rate studies or at least some basic data for such studies. We doubt that two additional men should be needed for rate studies but since some additional and continuing research may bring fruitful results and should be encouraged, we think we should allow \$10,000 a year to cover such studies and the costs of the proceeding. No separate computations and allowances are made for this purpose, however, the reasonable unit costs determined for administrative and general expenses having been made sufficiently higher than they otherwise would have been to provide funds to cover this expense.

192. On the basis of all the facts of record and the per unit costs shown above, it is found that the following are reasonable amounts per head to be covered into rates on account of Administrative and General Expenses.

Cattle and calves.....	5. 50 cents per head
Hogs.....	2. 25 cents per head
Sheep.....	1. 25 cents per head

#### **Business getting and maintaining**

193. The selling of livestock on a commission basis is a personal service business. Success in it depends upon the rendering of satisfactory service and in maintaining good relationships with the public. There are 25 market agencies operating on the Sioux City market which sell livestock on a commission basis, and a producer, farmer or feeder may consign his livestock to any of these agencies. Most of the livestock arriving at the Sioux City market originates within one hundred miles of the market. The agencies are in stiff competition

among themselves to attract patronage. Efforts to create good will and obtain volume vary all the way from outright advertising in newspapers and livestock periodicals to the giving away of novelties.

194. Throughout the hearing those connected with the various firms testified that most of the time spent in the country was devoted primarily to the appraisal of livestock but that a part of it was devoted to calling on potential shippers and possible patrons. The inspection of livestock in the country is referred to as "appraisal service." Respondents strenuously argue that appraisal work is essentially a service and not a device for getting business (see Par. 73, *supra*).

195. Most of the livestock arrives at the market during the beginning of the week. Receipts during the last days of the week, particularly Friday and Saturday, are light. Owners and employed salesmen, therefore, are not as busy at the market during the latter part of the week and have the opportunity to go to the country to look at livestock belonging to their patrons or prospective patrons. Salesmen have to be paid their salaries whether they remain at the market the latter part of the week or go to the country to look at livestock or to solicit patronage. Such trips by salesmen, therefore, do not increase salary costs to owners. However, these trips do increase the out-of-pocket costs incident to making country trips. Hotel bills, gas and oil, depreciation on automobiles, and other expenses vary with the number and extent of the trips made.

196. Competition for volume is extremely keen but since uniform rates are made mandatory by the act, this competition cannot manifest itself in rate concessions. Competition manifests itself instead in the efforts of the individual agencies to attract additional business. Due to the keenness of the competition, expenses resulting from the competition may run unreasonably high.

197. Much of the activity of the agencies in the country serves both to advertise a firm and to serve its patrons. The rules of the Sioux City Livestock Exchange classify appraisal trips as business soliciting trips and limit the number of trips which its members may make in the course of a month (Respondents' Ex. 3, Rule XXV). It is apparent that some of the expenses incurred upon these trips is in connection with livestock which does not come to the market and is disposed of elsewhere. In arriving at a reasonable per head cost to be covered into rates, it does not seem necessary to draw a line of distinction between pure appraisal service to patrons and advertising or solicitation. It would be difficult, if not impossible, to isolate the expenses for each category. In a business such as that in which the agencies are engaged, one dependent entirely on public patronage, a reasonable amount of outright advertising is justifiable and a reasonable amount of expense on account of advertising and appraisal trips

should be covered into reasonable rates. The expenses incident to the cultivation of good public relationships can be treated as a whole. We do not think that separate costs incident to country appraisal trips should be carried in their entirety into rates charged to all market patrons since many do not receive such special service. A more realistic approach in handling the problem is to consider all reasonable expenditures made in building up favorable public relationships as business getting and maintaining costs and to derive therefrom a reasonable unit cost applicable to all the agencies. This does not limit any agency in its advertising or in making as many country trips as it cares to make. However, if a particular agency shall see fit to incur additional expense in making appraisal calls on certain producers, farmers and feeders, the agency would have to recoup the extra costs out of the revenues received from the additional volume procured, namely, out of earnings. An alternative would be for the agency to make a charge for the rendering of special service to that individual who receives it. All patrons of all agencies should not bear the cost of rendering special services to some.

198. Keen competition among the agencies and the fact that rate concessions cannot be made tend to press business getting and maintaining expenses constantly upward. The evidence in this case shows that the number of market agencies operating on the Sioux City market is not excessive. This fact, however, is no assurance that some agencies will not incur excessive costs for business getting and maintaining. In Paragraph 62 of the 1931 order the Secretary found that "If excessive expenditures on account of competitive advertising be covered into a rate schedule, every shipper is paying to have himself persuaded to send his livestock to one commission firm rather than to another, which, presumably, can serve him as well." The fact that the number of appraisal trips is limited by the rules of the Exchange indicates that its members believe that there is danger it will be overdone.

199. Firms differ widely with respect to their business getting and maintaining policies. Small firms struggling to get a foothold naturally would be expected to work harder and make heavier expenditures to attract business. The owners of such firms expect to be compensated for present sacrifice of owner income out of future income from the new business obtained. Other firms, having grown large and having built up an organization sufficient to handle large volume, may spend heavily to maintain the volume position they hold in relation to their competitors. When overhead expenses have been paid out of revenues received from present volume, the additional revenue received from any new business carries through very largely into net owner income. The temptation is always present for a firm to strive to obtain

additional volume even though the expenditure necessary to get the new business may absorb a part or all of the additional revenue it produces. Other firms whose owners perform most of the work themselves may prefer to handle such business as the quality of their service may attract. The expenditures by such firms on account of public relationships might be smaller than the ratemaker would be justified in covering into rates to be charged by all firms. It is from the experience of all these firms that a determination must be made as to a reasonable amount to be covered into rates on account of business getting and maintaining.

200. For the purpose of ascertaining the relative cost to the various firms of business getting and maintaining (in which are included all costs incurred in cultivating good public relations, including appraisal trips to the country), the percentage relationship of such costs to the revenues received by the firms from selling and buying livestock can be computed. During the year 1947 the respondent firms spent the following percentages of their selling and buying revenues on business getting and maintaining as heretofore defined:

<i>Name of firm</i>	<i>Percentage</i>	<i>Name of firm</i>	<i>Percentage</i>
Brown-----	23.7	Mid-West-----	13.2
Carpenter-----	16.8	Producers-----	10.8
John Clay-----	15	Progressive Farmers-----	12.7
Farmers Union-----	10	Rice-----	21.2
Flynn-----	16.6	Frank E. Scott-----	14.4
Gehan-----	9.5	Petersen-----	19.3
Great Northwestern-----	16.6	Sioux City-----	16
Hudson-Coe-----	9.5	Steele-Siman-----	18
Ingwersen-----	7.9	Swanson-----	17.6
Johnson-Schroeder-----	7.5	Wagner-----	12.5
Lee Livestock-----	13.1	Waite-----	14.6
Long & Hansen-----	15.6	Wood-----	17.2
Earl De Maranville-----	17.4		

201. The expenditures for business getting and maintaining used in ascertaining the above percentages are out-of-pocket costs and do not include any amounts for the time owners or salesmen spend in the country. The percentages shown are derived from information appearing in the respondents' quarterly reports. Similar information is obtained from Government Exhibit 20, pages 1 and 2, which shows, among other things, the gross income of the 25 respondents and the amounts expended by the 12 representative firms for business getting and maintaining in 1947. For example, Carpenter Commission Company's gross income for 1947 amounted to \$40,788.36 and it spent \$6,305.76 for business getting and maintaining. One firm expended approximately 24 percent of its gross revenues in its public relations activities.

202. It is possible to set out expenditures for business getting and maintaining on a per head basis as to each species. To do this, it is necessary to adopt some appropriate method of allocation as between species. The method used is the ratio which the gross selling and buying revenues received in 1947 from each species bears to the total selling and buying revenues.

Name of firm	Cattle and calves (cents per head)	Hogs (cents per head)	Sheep (cents per head)	Name of firm	Cattle and calves (cents per head)	Hogs (cents per head)	Sheep (cents per head)
Brown.....	18	0.67	3.55	Carpenter.....	12.7	4.7	2.4
Earl De Maranville.....	13.3	4.85	3.0	Hudson-Coe.....	7.63	2.65	9.3
Flynn.....	13.4	5.2	2.9	Farmers Union.....	8.11	2.84	1.24
Great Northwestern.....	12.5	5.0	3.0	Producers.....	8.0	3.0	1.0
Gehan.....	7.2	2.7	2.5	Ingwersen.....	6.09	2.2	1.09
Johnson-Schroeder.....	5.9	2.1	1.2	Lee Livestock.....	10.3	3.7	1.9
Peterson.....	15.1	5.5	3.8	Long & Hansen.....	12.4	4.3	3.5
Progressive Farmers.....	9.67	3.77	1.6	Mid-West.....	10.8	3.7	1.7
Sioux City.....	12.1	4.0	3.34	Rice.....	17.2	5.9	2.6
Swanson.....	13.6	4.9	2.7	Frank E. Scott.....	11.7	4.0	2.1
Waite.....	10.8	4.2	2.6	Steele-Siman.....	14.2	5.1	2.3
Wood.....	13.7	4.9	3.1	Wagner.....	9.7	3.5	1.5
John Clay.....	11.6	4.2	1.7				

203. Upon the basis of all the evidence of record, it is found that it is reasonable to cover into a schedule of reasonable rates on account of public relations, denominated here as business getting and maintaining, the following amounts per head:

Cattle and calves.....	10 cents per head
Hogs.....	4 cents per head
Sheep.....	2 cents per head

#### Salesmanship—Per head cost of selling cattle

204. Unless livestock is sold so as to realize its full worth in accordance with prevailing market conditions, much of the farmer's, the feeder's, and the producer's effort comes to naught. It is imperative, therefore, that those who do the selling or buying be highly skilled in their calling whether they be owners of agencies or employees. Poor salesmanship is dear at any price. The responsibilities of salesmanship vary with the character of the consignments to be sold. The selling of fat steers is generally considered to demand the most skilled salesmanship. The selling of odd head of calves and of low-grade cows is considered to demand the least skilled salesmanship and is the selling function usually performed by beginners. The reason for this is clear. A mistake of 1 or 2 cents per pound on the weight of a small calf would amount to little in dollars and cents. A like mistake per pound on a carload of fat steers would be a serious loss to the owner.

205. In most firms of any considerable size one or more of the owners usually serves as a salesman of one or more species. One owner may sell cattle, another may sell hogs, and they may employ one or more additional salesmen. A reasonable per head cost for the selling of an animal of a given species must be covered into rates and this cost should be the same whether the selling is performed by an owner or by an employee. The records of the agencies are so kept that it is possible to determine for all species what annual salaries their employed salesmen receive. In the case of those firms all of whose salesmen are employees and in the case of other firms which employ salesmen to sell all of one species, it is possible to ascertain both the salaries paid to the salesmen and the amount of selling they do. In those cases in which one individual is the only salesman of a species, the number of head sold can be determined and the per head cost of salesmanship ascertained. In many firms, however, both owners and employees participate in the selling of the same species. The experience of such firms does not furnish a basis for making a mathematical computation of the per head cost of salesmanship. However, it is possible to know how many salesmen, whether owner or employee, worked during a year or a given period, and it is possible also to ascertain the number of head of a given species they sold. To arrive at a per head cost of salesmanship a determination must be made as to what constitutes a reasonable volume of livestock sold to be associated with a reasonable salary for performing that amount of selling service.

206. The record in this case shows the salaries drawn by employee salesmen in the year 1947 and in prior years as far back as 1943 and any bonuses paid to them. It shows also the monthly rate of pay to salesmen as of December 31, 1947, and as of May 1, 1948. Of 43 employee cattle salesmen working on the Sioux City market in 1947, 14 received less than \$3,000, 10 received between \$3,000 and \$4,000, 11 received between \$4,000 and \$5,000, 3 received between \$5,000 and \$6,000, 3 received between \$6,000 and \$7,000, 1 received \$7,933.20, and 1 received \$7,971.66.

207. The highest paid cattle salesman on the Sioux City market in 1947 drew an annual income of \$7,971.66, consisting of a salary of \$4,500 and a bonus of \$3,471.66. This salesman, together with the two owners who were also cattle salesmen, sold 78,621 head in 1947 (T. 675). This same firm had five cattle salesmen in 1930 and sold 39,429 cattle in that year. Conditions were not normal in either of these periods. In 1930, depression conditions existed, it was difficult to find outlets, and a buyer's market prevailed. In 1947, on the other hand, cattle were relatively easy to sell and a seller's market prevailed. One of the owners of this firm testified that in 1947 his firm did not

have as many salesmen as it should have had. This firm believes that it has been short one or two salesmen for a considerable period of time and intends to find and employ an additional salesman whether the volume of business increases or declines. The salary which it had in mind to pay this additional salesman is \$5,000 a year (T. 1152). If it be assumed that the two owner cattle salesmen were entitled to as much for selling cattle as their highest paid employee salesman, (\$7,971.66) and that the additional salesman to be hired would receive \$5,000 a year, the total cost of getting 78,621 head of cattle sold would have been \$28,915 or 36.8 cents per head. If, however, conditions in 1947 be taken as they actually were and if to each of the owners there be attributed a salary equal to that received by the highest paid employee salesman, the cost of getting 78,621 cattle sold would have been \$23,915, which is a per head cost of salesmanship of approximately 30 cents per head.

208. A helpful guide in arriving at a reasonable per head cost of salesmanship with respect to a particular species is the experience of those firms which hire salesmen to do all the selling. On the Sioux City market there are four such firms whose hired salesmen do all the selling of cattle (see Government Ex. 23). The total salaries of all cattle salesmen of each of these firms divided by the total number of cattle bought and sold by each during the year give a salesmanship cost of 28.33 cents per head for one firm, 24.57 cents for another, 31.72 cents for a third, and 29.78 cents for the fourth. These per head costs are arrived at from actualities in 1947. The experience of these firms is as reliable a guide to the per head cost of selling cattle as the record affords. In the case of these firms, it is not possible to determine how many cattle any one salesman sold or bought, but it is possible to divide the total number of cattle bought and sold by the number of people buying and selling and obtain an average performance per salesman for each firm.<sup>2</sup> The following table shows for each firm operating on the Sioux City market in 1947 the number of cattle salesmen, including owners, working in the firm, the total number of cattle and calves sold and bought, and the average number of head sold and bought per salesman :

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<sup>2</sup> Throughout the treatment of selling, buying has been treated as the equivalent of selling since buying and selling expenses are not isolated from each other.



Name of firm	Number of salesmen (12 months basis)	Cattle and calves (head)	Average per salesman per year	Name of firm	Number of salesmen (12 months basis)	Cattle and calves (head)	Average per salesman per year
Producers.....	3	120,305	40,102	Hudson-Coe.....	3	40,689	13,563
Jno. Clay.....	3	55,491	18,497	Brown, Goff, Foster.....	2	47,510	23,755
Farmers Union.....	3	32,331	10,777	Earl De Maranville.....	2	35,178	17,589
Ingwersen.....	3 1/2	54,888	17,802	Flynn.....	2	30,036	15,018
Johnson & Schroeder.....				Gehan.....	3	39,246	13,082
Lee.....	2 1/2	42,176	16,870	Great.....	3	24,344	8,114
Long & Hansen.....	3	78,621	26,207	Peterson.....	3 1/4	40,284	12,395
Mid-West.....	3	141,056	47,019	Progressive Farmers.....	4	41,326	10,331
Rice Bros.....	4 1/2	83,831	18,629	Sioux City.....	3	31,906	10,635
Frank E. Scott.....	5	67,162	11,432	Swanson.....	23 1/2	35,232	12,812
Steele Siman.....	7 1/4	161,750	21,567	Waite.....	5	54,130	10,826
Wagner.....	5	142,225	28,445	Wood Bros.....	3	45,467	15,156
Carpenter.....	2	38,032	19,016				

<sup>1</sup> The record does not show what species the salesmen of Johnson & Schroeder sell.

209. From the foregoing table it is seen there is great variation in the number of head of cattle and calves sold and bought per salesman per year in the various firms. One firm sold and bought over 40,000 head in 1947 for every cattle salesman it had. Another sold and bought over 47,000 for each cattle salesman. These were firms of large volume. Another large volume firm sold and bought over 28,000 head to the salesman, and still another firm over 26,000 per salesman. Some of the firms handling smaller volume sold from 18,000 to approximately 24,000 head per salesman. Other firms had lesser volume and consequently had less chance to keep their salesmen fully employed. Based on the foregoing performances, the selling of 20,000 head of cattle and calves per year is not an unreasonable number of cattle and calves to expect any reasonably efficient salesman to sell in the course of a year. Some salesmen sell double that amount or more. On the basis of the 1947 salary schedule of cattle salesmen's salaries there were 4 salesmen out of a total of 43 employed cattle salesmen who drew salaries of over \$6,000 per year. In the light of some decline in cattle receipts below the 1947 volume and in the light of the probabilities of some salary increases, it is reasonable to associate the selling of 20,000 head of cattle with a salary of \$6,000 a year. This will result in a reasonable per head cost to be covered into rates to be charged for the selling of cattle and calves. It is found that 30 cents per head should be covered into reasonable rates to be charged for the selling of cattle and calves.

#### Per head cost of selling hogs

210. There are a number of firms operating on the Sioux City market in which the owners sell other species than hogs and hire a hog salesman or salesmen to sell all the hogs consigned to them. The per head cost to these firms of getting their hogs sold can be ascer-

tained by dividing the salaries paid the hog salesman during a given period by the number of hogs sold during the same period. The hog receipts of some firms are large enough so that in addition to hiring a salesman to do the selling they hire a yardman to assist with the driving and handling and to assist in a minor way in the selling. The receipts of some of the other firms are so small that they each hire only one man in their hog department. He does both the selling and yarding with some help from other employees. In a firm of this sort, the total salary paid divided by the number of hogs sold is the per head cost to that firm of getting its hogs sold and yarded. In those firms which have a sufficient volume of hogs to warrant the hiring of one or more salesmen and a yardman or two, the salaries paid the salesmen divided by the number of hogs sold is a fairly accurate reflection of the per head cost to that firm of getting its hogs sold. Some of the firms list two hog salesmen but no hog yardman. One of the salesmen may be listed as an assistant salesman. In a case of this sort the assistant salesman is more of a yardman than a salesman. However this may be, the fact is that the salaries of both divided by the number of hogs sold represents the cost to the firm of getting its hogs sold and yarded.

211. The following table shows the number of hogs sold in 1947 by the firms which hire salesmen to sell all their hogs, the salaries paid the salesmen, and the per head cost of salesmanship including the per head cost of yarding in the case of those firms which had salesmen but no yardmen.

Name of firm	Number of salesmen	Number hogs sold	Total salaries	Per head selling cost or selling and yarding cost
John Clay.....	1	51,851	\$5,000	<i>Cents</i> 9 64
Farmers Union.....	2	95,822	7,705	8 07
Hudson-Coe <sup>1</sup> .....	2	31,162	5,000	16 04
Lee Live Stock.....	1	49,097	4,631	9 43
Long & Hansen.....	1 <sup>1/2</sup>	57,029	4,455	7 81
Rice Bros.....	1	100,414	2,855	2 84
De Maranville.....	1	14,786	2,579	<sup>1</sup> 17 49
Flynn Comm. Co.....	1	18,754	2,400	<sup>1</sup> 12 80
Gehan.....	1	50,691	3,477	6 90
Progressive Farmers.....	1	53,629	3,720	6 90
Waitt & Hruska.....	1	31,695	2,700	8 50
Wood Bros.....	1	42,008	2,480	5 90
Producers.....	1 <sup>1/4</sup>	91,327	5,077	5 60

<sup>1</sup> This firm has two hog salesmen but no hog yardman

<sup>2</sup> Includes both selling and yarding.

The per head unit costs for John Clay & Co., Farmers Union, Hudson-Coe, Lee Live Stock, Long & Hansen, and Rice Bros. are shown on Government Exhibit 23, p. 1

212. In 1947, 8 hog salesmen were paid between \$2,000 and \$3,000, 5 were paid between \$3,000 and \$4,000, 3 were paid between \$4,000 and \$5,000, and 1 was paid \$5,000. Only four employed hog salesmen

on the Sioux City market in 1947 received a salary over \$4,000. In six firms which hired salesmen to sell their hogs, the performance per salesman was 50,000 or more. On the basis of the performance of hog salesmen and in the light of the probabilities of some salary increases, it is reasonable to associate the selling of 50,000 head of hogs with a salary of \$4,800, an amount exceeded by only one employee hog salesman on the market in 1947. This will result in a reasonable per head cost of selling hogs to be covered into rates. It is found that 9.6 cents per head should be covered into rates for the selling of hogs.

#### Per head cost of selling sheep

213. Most of the firms operating on the market do not maintain sheep departments although they do receive some sheep consignments. The practice of these firms is to turn over their sheep to be sold by one of the few firms maintaining a sheep department. In such cases the regular commission charges are divided between the consignee firm and the firm which does the actual selling. The scale tickets issued by the stockyard company to the firm actually selling the sheep are turned over to the firm to which the sheep were consigned, and the latter firm does the necessary office work and accounts to the consignor. To those firms which do not maintain sheep departments, the handling of sheep is not a primary activity. Their sheep experience is useful in determining their costs on account of sheep for such functions as administrative and general expenses, office salaries, and the like, but it is not pertinent in determining the cost of selling sheep for the owners neither sell them nor hire others to sell them. The experience of those firms which maintain sheep departments and employee salesmen to sell sheep is pertinent in arriving at per head costs of selling this species. Many of the firms handle such a small volume of sheep that the per head costs of salesmanship are unreasonably high. The following table shows for each firm which maintained a sheep department the number of sheep sold, the number of salesmen, the salaries these salesmen drew, and the per head cost for each firm of getting sheep sold.

Name of firm	Number of salesmen	Salaries	Number of head	Per head cost
				<i>Cents</i>
Producers.....	1	\$4, 450	110, 305	4 0
John Clay.....	1	4, 200	61, 030	6 9
Farmers Union.....	1	4, 500	67, 075	6 7
Long & Hansen.....	1	1, 850	6, 877	1 27.0
Mid-West.....	1	6, 000	109, 533	5 5
Progressive Farmers.....	1	3, 970	34, 337	1 11.6
Rice Bros.....	1½	3, 736 and 565	63, 050	1 6 8
Steele-Siman.....	1	3, 700	43, 904	1 8 4
Wagner.....	2	3, 450 and 2, 400	90, 219	1 6 5
Sioux City.....	1	900	4, 302	1 21.0
Scott.....	1	2, 700	24, 423	1 11.0

<sup>1</sup> These firms have no yardmen. Per head costs are shown for both selling and yarding.

214. On the basis of the performance of salesmen in those firms which maintain sheep departments, and in the light of an expected decline in sheep receipts below the 1947 volume and in the light of the probabilities of some salary increases, it is reasonable to associate the selling of 75,000 head of sheep with a salary of \$4,800. It is found that 6.5 cents per head is a reasonable amount to be covered into rates on account of selling sheep.

#### **Return on capital**

215. The business of the respondents is highly personalized and does not require the use of capital to the extent of the general run of public utilities. The agencies own office furniture, fixtures and equipment and automobiles which represent capital (see Government Exhibit 21). Another item which should be considered in this connection is an adequate amount for working capital. As hereinbefore stated, the agencies collect their commissions daily, which provides a continuous inflow of cash (see Par. 167, *supra*). The agencies are paid by their consignors for the work done by their employees before the agencies pay their employees for the work they do for consignors. There are certain other items of expense, such as insurance, which the agencies must prepay, and they also must purchase and keep on hand supplies of forms and stationery used in the conduct of their business. These prepayments and inventories tie up funds and require working capital. The amount tied up in inventory from time to time, prepaid insurance, and other cash-requiring items is not subject to mathematical computation. In other rate cases, this question has been resolved by taking one-twelfth of total operating expenses, including salaries, and considering this amount as adequate for working capital. This seems to be a liberal allowance and the method heretofore followed is followed in this case. (See Government Exhibit 22.) Some of the firms carry automobile depreciation accounts in which they write off 25 percent of the cost each year. Other firms do not maintain depreciation accounts. In determining the value of automobiles owned by the agencies at the time of the hearing, automobiles purchased in 1947 have been included at their cost. Those purchased prior to 1947 have been depreciated at the rate of 25 percent per annum, and the depreciated value of such cars has been carried into capital.

216. The following table summarizes the capital considered as being devoted to the market agency business by each of 13 representative firms:

Name of company	Amount of capital	Interest at 7½ per cent	Name of company	Amount of capital	Interest at 7½ per cent
Carpenter.....	\$8,250.31	\$618.77	Mid-West.....	\$24,332.61	\$1,824.95
John Clay.....	15,213.34	1,141.00	Rice Bros.....	14,871.52	1,115.36
Farmers Union.....	27,663.05	2,074.73	Frank E. Scott.....	10,088.11	756.61
Hudson-Coe.....	6,601.51	495.11	Steele-Siman.....	22,069.84	1,655.24
Ingwersen.....	6,836.36	512.73	Wagner.....	24,389.07	1,829.18
Lee Livestock.....	9,913.87	743.54	Producers Commission.....	22,977.81	1,723.34
Long & Hansen.....	12,392.84	929.46			

217. The sum of \$8,250.31 representing capital allowed for the Carpenter firm is arrived at as follows:

1 Automobile (1946 model) see Government Exhibit 21..	\$2,533.00
Less depreciation at rate of 25%.....	633.25
	1,899.75
Add:	
Furniture and fixtures—see Government Exhibit 21..	1,347.56
Working capital allowance.....	2,603.00
	5,850.31
1 Exchange membership.....	2,400.00
Total .....	8,250.31

The amount of capital allowed for the remaining firms is calculated on a similar basis. The Exchange membership allowance of \$2,400 is calculated for each firm to provide for a return to respondents of the \$60,000 allowed for the group in Paragraph 133. Accordingly, this amount is allowed in the computations of capital for Farmers Union and Producers Commission Company although these firms are not members of the Exchange.

218. The following table shows the per head interest cost when the interest in the preceding table is allocated to species on the basis of the gross revenues received by each of the firms from each species in 1947 and when the amount of interest so allocated to each species is divided by the number of head of that species received in 1947 by each firm.

Name of company	Cattle and calves (cents per head)	Hogs (cents per head)	Sheep (cents per head)	Name of company	Cattle and calves (cents per head)	Hogs (cents per head)	Sheep (cents per head)
Carpenter.....	1.10	0.41	0.22	Mid-West.....	0.93	0.33	0.13
John Clay.....	1.40	.51	.21	Rice Bros.....	.86	.31	.14
Farmers Union.....	2.69	.95	.43	Frank E. Scott.....	.85	.30	.21
Hudson-Coe.....	.94	.33	.14	Steele-Siman.....	.60	.40	.13
Ingwersen.....	.71	.38	.33	Wagner.....	.89	.33	.14
Lee Livestock.....	1.22	.44	.29	Producers Commission.....	1.00	.37	.15
Long & Hansen.....	.92	.33	.27				

On the basis of the foregoing and all the facts contained in the record, it is found that the following are reasonable per head amounts on account of each species to be covered into rates for interest on the capital respondents have in their business:

Cattle and Calves.....	1.25 cents per head
Hogs.....	.40 cents per head
Sheep.....	.25 cents per head

#### **Management and uninsurable risks**

219. In arriving at a reasonable per head amount to be covered into rates, consideration must be given to the cost of management and of uninsurable risks, allowances for which are ordinarily referred to as profit. Among the respondents are three cooperative associations which hire and pay for management, and another agency, John Clay, is a branch with home offices in Chicago. The salary paid the resident manager of one of the cooperatives, the assessments made on its receipts of livestock to cover its share of the general organization expenses, the expenses incurred by its manager and others in travel, and other miscellaneous items amounted to \$12,935 in 1947. According to any reasonable standard for the measuring of the per head costs of management, the items of expense which go to make up this amount, spread over the volume handled by that cooperative, would be the maximum. Many of the items which go to make up this amount could be eliminated under strict scrutiny on the ground that they are not costs of management at all. For purposes here, however, this entire amount is considered as the cost of management to this firm. Similar expenses for one of the other cooperatives were \$5,203 in 1947. The expenses of the other cooperative attributable to management were \$4,302. In the case of one respondent firm which is a member of an organization operating at a number of livestock markets, the salary of the local manager was \$4,500. In addition to this, the home office contributed to its management. Because of this, some expense is rightly attributable to the operation of the branch firm. There are no figures in the record which make it possible to determine for this firm the proper amount to be considered as reasonable compensation for all its management, but the ascertainable cost for management would represent a minimum. A reasonable figure to be covered into rates would lie somewhere between this minimum per head cost and the per head cost to that cooperative whose experienced cost represents the maximum. The per head costs on account of management for these four agencies allocated to species on the basis of gross revenues received from each species in 1947 are as follows:

Name of firm	Cattle	Hogs	Sheep
	<i>Cents</i>	<i>Cents</i>	<i>Cents</i>
Producers.....	7.00	4.50	0.94
Farmers Union.....	7.00	2.30	.76
Progressive Farmers.....	5.00	3.20	.97
John Clay.....	5.00	2.60	.58

220. In addition to a proper amount to be covered into rates for management, there is the item also of uninsurable risks. The live-stock commission business is an agency business and, the faithfulness of the agents assumed, there is little chance for loss through the assumption by the agencies themselves of those risks against which they cannot obtain insurance. The experience of the respondents bears this out. Since 1943 the respondents have been making quarterly reports to the Secretary of Agriculture showing their expenses in detail. It is possible to identify both the occasion of the losses sustained and the amount. During this period there have been changes in the names of some of the firms. Some firms have gone out of business and others have begun business. The following table shows by firms and by years from 1943 to 1947, inclusive, the losses sustained by the agencies on account of bad debts, adjustments and errors in accounts, errors requiring refunds, losses on account of refused purchases, losses on account of estray animals, losses in handling branding fees, feed, freight, and other miscellaneous items:

Name of firm	1943	1944	1945	1946	1947
Brown.....	\$208	\$821	\$89	\$312	\$122
John Clay.....	53	184	0	50	200
Coe Commission.....	87	99	896	0	0
Farmers Union.....	83	65	46	4	0
Long & Hansen.....	206	6	234	127	222
Mid-West.....	10	430	362	25	82
Producers.....	255	165	135	555	81
Rice Bros.....	837	496	262	380	128
Steele-Siman.....	0	0	0	0	95
Wagner.....	667	60	1,160	712	1,051
Wood Bros.....	50	120	123	138	171
Hempstead.....	83	77	101	27	38
Carpenter.....	2	87	425	277	463
Flynn.....	2,135	686	0	104	590
Gehan.....	91	28	151	72	145
Great Northwest.....	73	2	0	0	0
Hudson-Coe.....	538	63	0	0	27
Johnson-Schroeder.....	11	0	0	0	0
Lee.....	27	294	262	93	20
Progressive Farmers.....	563	98	196	152	271
Rosenbaum Bros.....	8	32	0	0	0
Frank E. Scott.....	12	134	91	38	192
Sellon & Peterson.....	141	34	114	91	0
Sioux City.....	797	242	156	100	37
Swanson.....	165	1	73	222	1
Sullivan & Valin.....	42	0	0	0	0
Vickers & Herman.....	4	7	0	0	0
Walt & Hruska.....	25	290	378	59	72
Herman & Lacy.....	0	0	0	0	0
Ingwersen.....	0	0	0	0	38
Total.....	7,172	4,246	5,254	3,508	4,046

Grand total for 5 years: \$24,226.

221. In his cost study for the year 1947 the Government accountant included the losses shown above in administrative and general expenses. The per head costs for administrative and general expenses hereinbefore found to be reasonable reflect a reasonable amount for such losses. No specific separate amount need, therefore, be added here to cover such losses.

222. On the basis of the facts set out above and all the testimony, it is found that the following per head amounts should be covered into rates on account of management:

Cattle and calves-----	6.25 cents
Hogs-----	3.00 cents
Sheep-----	1.00 cents

#### Summary of unit costs

223. The following is a summary of the per head costs hereinbefore found reasonable to be covered into rates for the various items incident to the rendition of the services performed for the public by the respondent market agencies:

Item	Cattle and calves	Hogs	Sheep	Item	Cattle and calves	Hogs	Sheep
	<i>Cents</i>	<i>Cents</i>	<i>Cents</i>		<i>Cents</i>	<i>Cents</i>	<i>Cents</i>
Yarding salaries and yard expenses. ....	15 00	5 00	2 50	Salesmanship.....	30 00	9.60	6 50
Office salaries and expenses.....	14 00	5 50	2 50	Return on capital.....	1.25	.40	.25
Administrative and general expenses.....	5 50	2 25	1 25	Management expense....	6 25	3.00	1.00
Business getting and maintaining. ....	10 00	4 00	2 00	Total per head amount to be covered into rates.....	82.00	20 75	16 00

#### Value of the service

224. Respondents introduced considerable evidence to show respondents' proposed rates are not in excess of the value of the service. While they have succeeded in this objective, we have not been persuaded to adopt respondents' methods of arriving at reasonable rates or to adopt the precise level of rates sought by respondents for reasons given in other parts of this decision and order. Nevertheless, in the rates hereinafter prescribed as reasonable, the value of the service has been given recognition in two ways. Cattle generally sell for more than other species and carry the highest per head rates. Calves which generally sell for less than cattle but for more than hogs carry a rate higher than hogs but less than cattle. Sheep which generally sell for the least carry the lowest per head rate. The value of the service rendered by the agencies to their patrons at the present time has also been given recognition in that the rates hereinafter prescribed



are higher than they would have been on the basis of the same per head costs if prices of livestock were lower.

#### **Respondents' Flexible Tariff**

225. Respondents submitted two types of tariff with their petition, designated as Exhibits 1 and 2. Exhibit 1 sets forth a tariff combining straight headage charges with a percentage feature plan. Exhibit 2 sets forth buying and selling charges on a straight headage basis. The rates and charges proposed in Exhibit 1 differ from those set forth in Exhibit 2 with respect to selling charges. Respondents state that the two schedules, even with respect to selling charges, will produce the same return to respondents so long as sales prices of livestock remain substantially at present levels. The schedule of rates and charges set forth in Exhibit 2 is of the same structure as the schedule presently in effect except that the rate brackets of the former differ as to the number of head included in various brackets. Respondents contend that the rates based on the percentage plan are correlated to their costs of doing business and will produce revenues that will adequately reflect such costs and the value of their services. Nevertheless, respondents state that they are willing to have the Secretary determine the form in which the rates shall be cast in the event that the Secretary does not concur in the view of the respondents with respect to the soundness of the percentage plan.

226. The provisions of the percentage plan tariff (also called the flexible tariff) applicable to the selling of cattle are generally typical of those applicable to the selling of calves, hogs and sheep. The portion of such tariff applicable to the selling of cattle (see Respondents' Brief, p. 276) is as follows:

#### **SECTION A—SELLING CHARGES**

##### **Cattle:**

*Per head*

Consignments of one head and one head only----- \$1.50

Consignments of more than one head:

Consignments of 20 head or less:

1½% of gross proceeds of sale of each consignment, but not to exceed \$1.15 per head or to be less than 85¢ per head for the consignment.

Consignments of more than 20 head:

For 20 head in each consignment: 1½% of the gross proceeds of sale of such number of head but not to exceed \$1.15 per head or to be less than 85¢ per head for such number of head.

For all head over 20 in each consignment:

1½% of the gross proceeds of sale of all such number of head but not to exceed 90¢ per head or to be less than 70¢ per head for such number of head.

227. The respondents state that the object of the flexible tariff is not primarily to place the commission charges of the respondents on a percentage basis. It contains both maximum and minimum charges which operate as upper and lower limits on the amount returnable to the commission merchant under the tariff. The prime factor in determining whether the percentage or the maximum or minimum would be applied in a given case would be the market sales prices at the time of the transaction. At present, market sales prices are at such a high level that the application of the percentage feature of the charge to the gross sales proceeds would result in an amount in excess of that obtainable by applying the maximum headage charge, so that the maximum charge would measure, at the present time, the return to which respondents would be entitled. As market sales prices decline, a point would be reached when application of the specified percentage to the gross sales proceeds would result in an amount less than that realized by application of the maximum per head charge to the consignment, so that, in such instances, the amount of return would be that realized by the application of the percentage rate to the gross sales proceeds. As the downward trend in market values of livestock continued, a point would be reached when the amount of return available to respondents by application of the percentage to the gross sales proceeds would be less than the minimum per head charges, so that, in such case, respondents' charges would be controlled by the minimum headage charges. The reverse of the foregoing situation would take place when the sales price of livestock began to rise once more. In an upward spiral, a point would be reached when the amount charged by application of the percentage rate to the sales proceeds would be in excess of the minimum per head charges, so that such percentage rate would determine the respondents' rate once more. So, also, when the amount returnable to respondents by the application of the percentage rate to the sales proceeds exceeds the amount determined by applying the maximum per head charge, the maximum charge would become operative. All these charges would take place automatically. The then current sales price of the livestock would determine the rate in a given instance.

228. The respondents offered testimony showing how, on a historical basis, the proposed tariff would have operated between 1930 and 1947 had such tariff been in effect and the range of market prices during such period when the percentage, the maximum, or the minimum charge would have been operative. Respondents also offered in evidence Exhibits 32 and 33 for the purpose of showing graphically the operation of such factors. The exhibits were offered through

Robert I. Jones, an accountant of Arthur Anderson & Co., accountants and auditors, Chicago, Illinois. Respondents' Exhibit 32 contains a group of 8 graphs from which it is possible to see the relationship between the average parity price per hundredweight for livestock during the period 1930 to 1947, the average sales prices per hundredweight during such period, and the areas in which the maximum, the minimum and the percentage charges of the proposed tariff would have been in effect during such period.

229. Respondents' Exhibit 33 shows, for the period 1930 to 1947, a comparison of the average selling charge which would have been made if the proposed tariff had been in effect, the average actual selling charge and the range of selling charges under the proposed tariff within which the percentage feature would have been applicable.

230. Respondents state that the reasonableness of the flexible tariff is also indicated by comparing respondents' charges for selling hogs and beef cattle with the charges made by other agents in selling the corn equivalents thereof. Respondents' Exhibit 34, Tables 1 and 2, discloses that it costs less to market corn as livestock than as corn.

231. The buying charges in the respondents' flexible tariff are in the form of straight headage charges and are well below the selling charges. It is stated that most of the firms only purchase feeder and stocker livestock for patrons in the nearby feeding territory and most of the increases proposed deal with such livestock. Respondents state that the volume of such business is insignificant when compared with that attributable to their selling activities.

232. Respondents point out that flexible tariffs, such as they propose, are in widespread use in the livestock industry. Witness Ashby testified that some 20 federally supervised auction markets in the Sioux City market area operate on a graduated commission rate basis; that 19 of such markets are on a partial percentage or flexible basis in that 15 have commission charges that vary according to the weights of the livestock sold; that at 14 markets rates vary according to the sales price; and that some markets use a combination of percentage and headage rates. There is no doubt that such is the case.

233. Respondents also offered evidence to show that it is a common practice in the case of the sale of other commodities for the sales agent to receive his reimbursement on a percentage basis. For example, the selling charges on the Sioux City Grain Exchange for the sale of corn is one percent of the selling price, with a minimum of one cent per bushel and a maximum of two cents per bushel. Additional charges for inspection and weighing are assessed against the shipper. Similarly, selling charges are assessed on a percentage basis in connection with the sale of tobacco, fruits and vegetables, fluid milk, hides,

pork, lard, meat and grains. Also, the same type of charge is assessed by brokerage houses in connection with the selling of securities on the New York Stock Exchange.

234. Efforts in the direction of getting flexibility into tariffs as distinguished from flat charges per head are to be commended. We can appreciate also respondents' apparent desire to have their rates reflect to some degree high livestock prices. However, we do not believe it wise to prescribe at this time a tariff based upon a percentage of the selling price of livestock in the manner advocated by respondents. Respondents and the Branch agree that the basic objective of rates in a proceeding such as this is to return the costs of the service. The plan seems to assume that respondents' costs are lower when the sales prices are lower and that the costs are greater when the sales prices are higher. While it is true that there is some correlation between respondents' costs and the selling prices of livestock, as contended for by respondents, it is apparent that the correlation is in a broad sense over a long period of time. There are significant yearly fluctuations. A large corn crop may result in large numbers of hogs produced and a reduced price although the general price level and respondents' costs remain in *status quo* or even increase. For example, hog prices have come down considerably since the hearing but respondents' costs have probably gone up. Conversely, due to weather conditions or other factors, a reduced supply of livestock may result in higher prices for livestock in advance of any increase in the general price level. Without additional study with a view to taking account of such factors, we are not convinced that the correlation has been shown to be sufficiently close to warrant a conclusion that the rates resulting from the percentage schedule would be reasonable. Again, it appears that for some time the percentage plan advocated would not be effective because livestock prices are at a level higher than the maximum flat charges proposed. This is another reason for not now prescribing the percentage feature since the plan would not go into operation until some indefinite future time. Perhaps the intervening period could be used for further research on the matter of a percentage plan or other formula which would be more closely correlated with respondents' costs. It might be observed too that the present proposal is somewhat complicated with the minimums, maximums and a percentage plan working between. Several computations would be necessary in many cases to determine the applicable charge.

#### VII. Unreasonableness of Current Rates

235. The original order prescribed rates on the basis of conditions prevailing prior to and at the time of the original hearing. That was

more than seventeen years ago but the rates prescribed in the order of July 25, 1931, are still the only rates as to the unreasonableness of which a finding has been made. On November 19, 1937, a supplemental order was issued without a hearing which permitted the respondents to put into effect temporarily a schedule of rates higher than those prescribed in the original order. From time to time since that date other supplemental orders have been issued permitting temporarily other rates for specified short periods. The last of these orders permitted temporary rates to go into effect on January 1, 1948, which rates are now in force. Many substantial changes in the conduct of respondents' business have occurred since the original hearing. The manner in which livestock arrives has changed in that the truck has largely superseded the railroad car as a means of transportation and costs have increased considerably. The structure of the tariff originally prescribed as reasonable no longer fits the changed mode of arrival. Upon the basis of the findings and conclusions heretofore made and a consideration of all the evidence in this proceeding, it is found that the rates and charges imposed by the basic order of July 25, 1931, which have not been effective since 1937, contain rates and charges which are unjust and unreasonable, and that the rates and charges currently in effect should be replaced by the rates and charges found herein to be reasonable.

### VIII. Reasonable Rates

236. On the basis of the foregoing and all the evidence of record, it is found that the following constitutes a schedule of just, reasonable and nondiscriminatory rates and charges for the buying and selling of livestock on a commission basis at the Sioux City Stock Yards, Sioux City, Iowa:

#### DEFINITIONS

*A consignment.*—For the purpose of assessing selling charges, is all the livestock of one species (cattle, calves and bulls to be considered as separate species) belonging to one owner and delivered to one market agency, and offered for sale by it during the trading hours of one day.

*A purchase order.*—For the purpose of assessing buying charges, is all the livestock of one species (cattle, calves and bulls to be considered as separate species) bought at any time but shipped to, or delivered to, one person on one market day.

*A draft.*—Is all the livestock of one species (cattle, calves and bulls to be considered as separate species) in one consignment sold to the same purchaser, at the same time, and at the same price per cwt., irrespective of how the livestock is weighed.

*A person.*—Is an individual, a partnership, a corporation, and/or an association of any such acting as a unit.

*Calves.*—Are animals of the bovine species, weighed in drafts, the average weight of the animals in which is 400 pounds or under.

**Cattle.**—Are animals of the bovine species, weighed in drafts, the average weight of the animals in which is over 400 pounds.

**Bulls.**—Are uncastrated male animals of the bovine species, weighed in drafts, the average weight of the animals in which is over 700 pounds.

#### SELLING AND RESELLING CHARGES

Cattle:	<i>Per head</i>
Consignments of 1 head and 1 head only.....	\$1. 20
Consignments of more than one head:	
First 5 head in each consignment.....	1. 00
Next 10 head in each consignment.....	. 95
Each head over 15 in each consignment.....	. 85

The maximum charge on a consignment of cattle arriving by rail shall not exceed an amount equal to \$28 multiplied by the number of cars in which the consignment arrives at market.

Calves:	<i>Per head</i>
Consignments of 1 head and 1 head only.....	\$0. 65
Consignments of more than 1 head:	
First 5 head in each consignment.....	. 55
Next 10 head in each consignment.....	. 50
Each head over 15 in each consignment.....	. 40

The maximum charge on a consignment of calves arriving by rail shall not exceed an amount equal to \$28 multiplied by the number of single deck cars in which the consignment arrives plus \$33 multiplied by the number of double deck cars in which the consignment arrives.

	<i>Per head</i>
Bulls, irrespective of manner of arrival.....	\$1. 50
Hogs, irrespective of manner of arrival:	
Consignments of 1 head and 1 head only.....	. 50
Consignments of more than 1 head:	
First 10 head in each consignment.....	. 37
Next 15 head in each consignment.....	. 31
Each head over 25 in each consignment.....	. 26

Sheep:	
Consignments of 1 head and 1 head only.....	. 50
Consignments of more than 1 head:	
First 10 head in each 250 head in each consignment.....	. 35
Next 20 head in each 250 head in each consignment.....	. 28
Next 30 head in each 250 head in each consignment.....	. 22
Next 40 head in each 250 head in each consignment.....	. 12
Next 150 head in each 250 head in each consignment.....	. 06

The maximum charge on any consignment of sheep arriving by rail shall not exceed an amount equal to \$20 multiplied by the number of single deck cars in which the consignment arrives plus \$27 multiplied by the number of double deck cars in which the consignment arrives.

#### EXTRA SERVICE SELLING CHARGES

In the case of those consignments where more than three drafts are necessary, 25 cents per draft in excess of three, maximum \$3 on any one consignment, will be charged. (This provision does not apply to PURCHASE ORDERS.)

### BUYING CHARGES

The charges for buying any species of livestock shall be the same as the selling or reselling charges for that species, except that no charge shall be made on account of extra drafts. When, however, it is necessary for the agency to pick up the PURCHASE ORDER from more than three other agencies and/or dealers, a charge of \$0.50 shall be made for each market agency and/or dealer over three from whom the PURCHASE ORDER is picked up.

### EXTRA SERVICE BUYING CHARGES

When cattle bought from other firms by the purchaser himself are paid for, and/or picked up, and/or billed out, and/or any assistance is given relative to tuberculin or abortion tests, the regular buying commissions herein provided shall be charged.

When cattle consigned to a commission firm for sale are sold to a buyer who requests that his purchase be billed out, one-fourth the regular buying commission shall be charged to the buyer, except that there shall be no charge when the Sioux City Stock Yards Company will accept for forwarding orders out of pens into which delivery off scales is made. When any assistance is given relative to tuberculin or abortion tests, the regular buying commission herein provided shall be charged.

### OTHER SERVICE CHARGES

For delivery of cattle and/or calves to brand chutes for branding, dehorning, castration, vaccination, etc., the charge shall be five cents per head, with the minimum charge for any one lot of cattle and/or calves, \$1.00. (This is in addition to the two service charges listed above.)

The Sioux City Livestock Exchange will make a charge against each firm for whom it makes collections of checks for livestock sales and purchases, based on the cost of such service prorated on a basis of the number of items handled, bills for such service to be rendered and paid monthly.

A check of the number of items will be made one month in four, and the result of that check will serve as a basis for the charge for the ensuing four months. The minimum charge per month for any firm will be twenty-five cents.

For computing, collecting and paying or remitting to the person entitled to receive the same, any truck or hauling charge for transporting livestock to or from the Sioux City Stock Yards, a charge of ten cents shall be made, this charge to cover all collections and remittances of such hauling charges as shall be made at one time covering deliveries of livestock on a single market day, by one truck carrier.

Charges for inspection shall be made, as hereinafter set out, to cover inspection of hogs for dockage when necessary, and inspection of hogs for injury or disease affecting their fitness for human food; inspection of cattle for injury or disease affecting their fitness for human food; inspection and examination of cripples or dead animals for marks of identification, and the weighing of dead animals and rendering reports thereon to the consignees, consignors, and U. S. Bureau of Animal Industry.

*Hogs.*—A charge of 50 cents shall be made, to apply on the additional cost of inspection of hogs, whenever an appeal is taken from the shrinkage or dockage fixed by the Inspector in Charge at the scale to the Chief Inspector, said charge to be paid by the person or firm appealing.

A charge of \$1.50 shall be made, to be paid by the person appealing, whenever an appeal shall be taken from the decision of the Chief Inspector to the Board of Arbitrators, said sum to be divided prorata between the arbitrators acting in the case, as their compensation for service.

A charge of 30 cents per carload shall be made to cover the cost of inspection of hogs for dockage when necessary, and inspection for injury or disease affecting their fitness for human food on all hogs arriving by rail. On hogs trucked or driven in, a charge of 1½ cents per head up to 30 cents shall be made for any lot of hogs not exceeding 30 head. The same rate shall apply on the excess over 30 head.

*Cattle.*—A charge of 30 cents per carload, regardless of number of animals in any car, shall be made on all cattle arriving by rail, to cover the cost of inspection of cattle sold for slaughter for disease or injury affecting their fitness for food. On cattle trucked or driven in, the charge shall be 1½ cents per head up to 30 cents for each lot not exceeding 25 head, the same rate to apply on the excess over 25 head.

### IX. Adequacy of the Rates

237. In arriving at the per head costs heretofore found reasonable for each species consideration has been given to incurred costs of typical firms, to amounts necessary to remunerate management as measured by the experience of those firms which employ salaried managers, and to interest on capital supplied by owners for the use of the public. If this were a case involving the rates to be charged by a natural monopoly, rates high enough to produce sufficient revenues for these purposes would meet those criteria of reasonableness generally recognized and followed. But this is not a case of that kind; it is a case in which rates are prescribed for each individual member of a group of agencies all serving the same general territory, all competing with each other for patronage, and all under compulsion of law charging uniform rates. This is a circumstance that must be given weight even though not subject to mathematical computation and statistical analysis.

238. Due in part to this peculiarity of the commission business the rates prescribed have been set at a point high enough to produce enough per head revenues to meet all the per head costs found reasonable for each of the species and, in addition, a substantial per head margin.

239. The record shows for the firms used as typical the number of head of cattle and calves falling in each bracket of the schedule in effect throughout the year 1947, including that bracket denominated "the first 15 head." It does not show specifically the number of head which arrived in consignments of from 2 to 5 head, inclusive, and from 6 to 15 head, inclusive. It does show the average number of head per consignment received by each of the firms operating on the market. The average number of head per consignment so received justifies the conclusion that at least half of the cattle and calves arriving in consignments of from 2 to 15 head, inclusive, arrived



in consignments of from 2 to 5 head, inclusive. For purposes of testing the revenue producing power of the prescribed rates, the number of head arriving in 2 to 5 head consignments is taken as equal to the number of head arriving in the 6 to 15 head consignments.

240. A schedule of rates of the same structure as that in effect in 1947 but with rates of \$1.20 for the one head bracket, 95 cents for the 2 to 15 head bracket, and 85 cents for the over 15 head bracket for cattle, and rates of 65 cents, 50 cents, and 40 cents per head for like brackets for calves, would produce per head revenues on cattle and calves of 92.3 cents per head. The difference between this figure and the reasonable per head cost of 82 cents per head found to be reasonable for cattle and calves is a margin of 10.3 cents per head. The rates prescribed herein on the assumption made as to cattle and calves will produce the following per head commissions when applied against the cattle and calves received by the representative firms for the full year 1947, the hogs received from January 27 to December 31, 1947, and the sheep received during the first quarter of 1948:

<b>Cattle</b>			
Consignments of 1 head and 1 head only.....	23, 799	\$1.20	\$28, 558 80
Consignments of more than 1 head			
First 5 head in each consignment .....	261, 205	1.00	261, 205 00
Next 10 head in each consignment .....	261, 204	.95	248, 143. 80
Each head over 15 in each consignment .....	234, 971	.85	199, 725 35
	781, 179		737, 632. 95
Revenues per head—\$0.944.			
<b>Calves</b>			
Consignments of 1 head and 1 head only.....	403	.65	261. 95
Consignments of more than 1 head			
First 5 head in each consignment .....	3, 450	.55	1, 897 50
Next 10 head in each consignment .....	3, 450	.50	1, 725 00
Each head over 15 in each consignment .....	1, 360		544 00
	8, 663		4, 428 45
Revenues per head—\$0.511.			
Total head cattle and calves—789,842.			
Total amount—\$742 061 40			
Revenues per head—\$0.9396.			
<b>Hogs</b>			
Consignments of 1 head and 1 head only.....	4, 128	.50	2, 064 00
Consignments of more than 1 head			
First 10 head in each consignment .....	313, 474	.37	115, 985 38
Next 15 head in each consignment .....	212, 028	.31	65, 728 68
Each head over 25 in each consignment .....	124, 006	.26	32, 241. 56
	653, 636		216, 019. 62
Revenues per head—\$0.33.			
<b>Sheep</b>			
Consignments of 1 head and 1 head only.....	79	.50	39 50
Consignments of more than 1 head			
First 10 head in each 250 head in each consignment.....	9, 742	.35	3, 409 70
Next 20 head in each 250 head in each consignment.....	14, 656	.28	4, 103 68
Next 30 head in each 250 head in each consignment.....	15, 612	.22	3, 434 04
Next 40 head in each 250 head in each consignment.....	14, 642	.12	1, 757 04
Next 150 head in each 250 head in each consignment.....	29, 175	.06	1, 750 50
	83, 906		14, 495. 06
Revenues per head—\$0.173.			

The per head costs found reasonable herein as to each species deducted from the per head commissions producible by that portion of the schedule set out in cents per head results in the following margins:

	Cattle and calves	Hogs	Sheep
Per head revenues .....	\$0.9395	\$0.3300	\$0.173
Reasonable per head costs .....	.8200	.2975	.160
Margins .....	.1195	.0325	.013

241. The revenues derivable from the rendering of extra services have not been included in computing the per head commissions under the rates found reasonable. Inspection charges on hogs, for instance, are to be assessed at the rate of 30 cents a carload, and at 1½ cents per head on those arriving by truck up to 30 head in one lot with a maximum of 30 cents on any one lot. The inspection charges on cattle will amount to approximately 1½ cents per head. A computation as to what per head revenue the other extra service charges will produce is impracticable. It is not possible, therefore, to ascertain the exact amount of revenue per head that will be derived from the rendering of all the extra services. But whatever the amount may be on the various species, the per head commissions will be increased by those amounts, with the result that the per head margins shown will be increased by the same amounts.

242. The rates prescribed are for a group of competing market agencies, not for a utility enjoying a natural monopoly. The results to the various agencies of charging the same rates will naturally vary. In order to make sure that the rates will not work a hardship upon reasonably efficient younger firms and others which for one reason or another are not yet firmly established, a per head margin above reasonable per head unit costs has been provided. An additional reason for allowing a margin between per head revenues and per head costs is in order to provide a cushion which can absorb a decline in volume of receipts and for other contingencies. If the volume should decline, most of the agencies would not be able immediately to reduce their costs in the same ratio. Their per head costs could not be held stationary but would increase and, but for the margins, the increase in per head costs would warrant the agencies in seeking an increase in rates. While rates are not prescribed in perpetuity, it is not desirable that they be changed with too great frequency. The inclusion of a margin makes it possible for the agencies to establish reserves against a decline in volume and other contingencies, and so makes for rate stability.

243. The rates which are prescribed in this case are fixed and uniform charges to be observed in any individual transaction between any agency and any patron. The prescribing of this fixed and uniform rate schedule for a unit of service irrespective of by whom rendered

does not limit the amount that any individual may earn in the aggregate. That aggregate will depend upon the efficiency with which he conducts his business and the amount of business he can attract with the quality of service he renders and through justifiable publicity.<sup>3</sup>

244. Under a schedule of rates based on a reasonable per unit cost, the aggregate amount paid by the public which elects to market its livestock at Sioux City will vary with the volume consigned to that market to be serviced. It will not depend on the number of owners of agencies who hold themselves out as willing and ready to serve the industry. Rates arrived at on the basis of reasonable unit costs leave each owner free to earn what he can. If one owner does well, his prosperity is not evidence that the rates are too high. If another does poorly, his lack of prosperity is not evidence that the rates are unreasonably low. If, on the other hand, an average salary for all owners should be considered as a necessary and legitimate factor in the building up of a reasonable schedule, then that average or some other would become a necessary factor in making a determination of the reasonableness of the future results of the rates. The crux in either case would have to be the fixing of average salaries of owners to be covered into rates. If an average salary for owners were a necessary rate factor, as I do not believe it is, a rate case could be precipitated without a change in either the quantity or quality of the service and without a change in actual costs. All that would be necessary would be for present owners to take in as partners those employees whose salaries were less than the average for owners and claim the aggregate increase as an increase in costs that must be passed on to the public in increased rates. It is not the function of the Secretary of Agriculture under the Packers and Stockyards Act to fix, limit, increase or decrease the salary of any individual owner of any market agency, or to determine what the aggregate or the average of all should be. We doubt that a rate policy can be sound which would make it necessary for him to do indirectly in making rates what he has no right under law to do directly.

<sup>3</sup> For instance, if the owner of a firm is a cattle salesman and sells all the cattle he receives and he hires all his hogs and sheep sold, the amounts per head he may retain out of the per head revenues received under the rates will be as follows:

	Cattle and calves	Hogs	Sheep
Account of management performed by owner.....	\$0 .0625	\$0.0300	\$0.0100
Interest .....	.0125	.0040	.0025
Selling .....	.3000	.0000	.0000
Margin .....	.1195	.0325	.0130
Per head .....	.4945	.0665	.0255

His total earnings would be these amounts applied against the number of head of each species received, together with such revenues as he would collect for the rendering of any extra services for which rates have been set.

245. Respondents have asked that they be treated in this proceeding in a manner encouraging to an industry group in need of revitalization. Throughout, we have tried to keep this in mind and to be as favorable as is consistent with the obligation to arrive at rates reasonable to the patrons as well as respondents. Although we do not think the appropriate test to be how well respondents *as a group* will fare under the rates prescribed, comparison of the rate schedule prescribed with the rate schedule in effect in 1947 demonstrates that, as a group, respondents' interests have not been treated lightly or disregarded.

### ORDER

246. On and after March 1, 1950, the respondent market agencies shall cease and desist from demanding or collecting for any stockyard service rates or charges other than those set forth in Paragraph 236 hereof and, within 20 days from the date hereof, shall publish and file with the Secretary of Agriculture a schedule of such rates and charges to become effective on March 1, 1950.

247. The respondent market agencies shall continue to make reports to the Secretary of Agriculture in the same form as those which have heretofore been submitted pursuant to informal agreement, provided, however, that the respondents and the administrative officials of the Packers and Stockyards Division may, if desired, devise and agree upon a new form of report and submit it for consideration and approval.

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(No. 2327)

BENNETT-MOUNT COMPANY v. O. F. YOUNG PRODUCE CO., INC. PACA  
Doc. No. 5239. Decided January 4, 1950.

### Rejection of Commodity—Default

Where complainant alleges that it sustained a loss on resale due to respondent's rejection of a truckload of potatoes, and respondent failed to file an answer, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint, and respondent's failure to accept the potatoes purchased from complainant is a violation of section 2 of the act for which complainant is entitled to an award of reparation to the extent of its loss.\*

*Messrs. Turp and Coates*, of Hightstown, New Jersey, for complainant. *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1446 ed. 1499a *et seq.*). An informal complaint was received August 20, 1948. A formal complaint was filed September 28, 1949, alleging failure on the part of the respondent to accept a truckload of potatoes purchased from complainant and requesting reparation in the amount of damages sustained on resale as a result of respondent's rejection. A copy of the report of investigation made by the Department was served on complainant's attorneys October 24, 1949. On the same date copies of the report of investigation and the formal complaint were served upon respondent.

At the time of the service of the complaint respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint. Respondent did not file an answer and this proceeding is disposed of on the basis of such default.

### FINDINGS OF FACT

1. The complainant is a partnership composed of G. A. Bennett, William A. Mount and John H. Mount, trading as Bennett-Mount Co., whose post office address is Wyckoff Avenue, Hightstown, New Jersey.

2. The respondent, O. F. Young Produce Co., Inc., is a corporation whose post office address is Box 2062, Asheville, North Carolina. At the time of the transaction complained of herein respondent was not licensed but was operating a business subject to license under the act. Respondent subsequently obtained a license and paid arrearage for the period beginning June 26, 1948, to the date of the license.

3. On or about July 23, 1948, in the course of interstate commerce, complainant sold to respondent 250 100-lb. bags of U. S. No. 1, Size A, Cobbler potatoes at \$3.35 per bag, delivered, or a total purchase price of \$837.50.

4. The potatoes were shipped by complainant from Hightstown, New Jersey, to respondent in Asheville, North Carolina. They were rejected by the respondent but Government inspection after arrival at Asheville showed the potatoes to be U. S. No. 1, Size A, and, therefore, in conformance with the terms of the contract.

5. The potatoes were resold by complainant in Burlington, North Carolina, at \$2.50 per bag, or a total sale price of \$625. Complainant sustained damages as a result of the rejection in the amount of the difference between the original sale price and the amount realized

on resale, or \$212.50, plus \$137.50 freight charge from Asheville to Burlington, making the total loss to complainant \$350, no part of which has been paid by the respondent.

6. Informal complaint was made on August 20, 1948, which was within nine months after the cause of action accrued.

### CONCLUSIONS

The failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint, as provided for in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that the respondent purchased from complainant one truckload of U. S. No. 1, Size A, Cobbler potatoes, delivered, at an agreed purchase price of \$837.50; that the complainant tendered for delivery potatoes which met the requirements of the contract; that respondent rejected the potatoes; and that complainant resold the potatoes for \$625, or \$212.50 less than the agreed purchase price. As a result of respondent's rejection, additional freight charges were incurred in the sum of \$137.50. These charges, added to the loss on resale, resulted in damages to the complainant of \$350. The failure of the respondent to accept the produce is a violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$350, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this decision respondent shall pay to complainant, as reparation, \$350, with interest thereon at the rate of 5 percent per annum from August 1, 1948, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2328)

FEDERAL FRUIT AND PRODUCE COMPANY v. PRICE DISTRIBUTING COMPANY. PACA Doc. No. 4925 Decided January 4, 1950.

### Dismissal—Failure To Prove Extent of Damage From Improper Loading f. o. b. Shipment

Where a carload of a highly perishable variety of apples met contract requirements when shipped under f. o. b. contract of sale but a portion of the shipment was damaged in transit from negligence in bracing the load for which shipper is responsible, it is held, that the claim for damages based on resale prices received over a period of three weeks on a declining market is too remote to establish the reasonable value of the apples on arrival and

that the complaint should be dismissed for failure to show damages resulting from the shipper's negligence.\*

*Messrs. James B. Radetsky and A. E. Small, Jr., of Denver, Colorado, for complainant. Mr. Ernest Falk, of Yakima, Washington, for respondent. Mr. C. Carlile Carlson, Presiding Officer.*

*Decision by Thomas J. Flavin, Judicial Officer*

#### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930 (7 U. S. C. 1946 ed. 499a *et seq.*), for the recovery of \$1,364.76, the loss allegedly sustained by complainant as a result of improper loading of a carload of apples purchased by complainant from respondent. Informal complaint was filed with the Department on February 12, 1947. The formal complaint was filed on December 29, 1947, and a copy of it, together with a copy of the report of investigation made by the Regulatory Division, was served by registered mail on the respondent on March 23, 1948. A copy of the report of investigation was served by registered mail on complainant's attorney on March 22, 1948.

Respondent filed an answer to the formal complaint on April 12, 1948, admitting the sale of a carload of apples to complainant as alleged in the complaint, except the answer alleges that the apples were "Jumble Pack" (rather than "Jumbo" pack). The answer denies the allegation in the complaint to the effect that respondent failed to deliver a carload of apples which had been properly loaded and braced in accordance with custom and tariff rules, and alleges that any loss which may have been sustained by complainant was occasioned by rough handling in transit, together with complainant's delay in unloading and selling the apples.

An oral hearing was held at Yakima, Washington, on March 10, 1949. Complainant did not appear at the hearing, but the Presiding Officer introduced in evidence the depositions of Joseph Naiman and J. R. Hailey which had been taken at Denver, Colorado, on June 21, 1948. Respondent was represented at the hearing by counsel and offered the testimony of Winston E. Brady, Carl H. Behnke, and Willis F. Sonderman.

#### FINDINGS OF FACT

1. Complainant is an individual, Emma Naiman, trading as the Federal Fruit and Produce Company, whose post office address is 210 Denargo Market, Denver, Colorado.

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

2. Respondent is a partnership composed of Hilda L. Price and Carl H. Behnke, doing business as the Price Distributing Company, whose post office address is post office Box No. 780, Yakima, Washington. At the time of the transaction involved herein, respondent was licensed under the act.

3. On or about July 9, 1946, contemplating the shipment of a perishable agricultural commodity in the course of interstate commerce, and through negotiations conducted by Atwell and Company, a broker of Denver, Colorado, complainant and respondent entered into a contract for the sale by respondent to complainant of a carload of combination grade 2¼ inch minimum, jumble pack, Transparent apples, at an agreed price of \$3.15 per box f. o. b. Yakima, Washington.

4. On or about July 11, 1946 car PFE 31919, containing 798 boxes of Washington Combination Extra Fancy, Fancy and C Grade Transparent apples was sold by the Twin City Produce Company, and shipped by the seller from Pasco, Washington, to respondent at Yakima, Washington. On or about July 14, 1946, respondent billed the car to itself at Denver, Colorado, for delivery to complainant.

5. Car PFE 31919 arrived at Denver, Colorado, on the morning of July 17, 1946. A Federal inspection made of the shipment on July 20, 1946, revealed that the load had shifted, some of the bracing was splintered, many of the boxes were racked, and some were broken. With respect to the condition of the apples, the inspection certificate reads, in part, as follows:

"In badly broken boxes generally 15% to 40%, average approximately 30% badly bruised. In remainder boxes including many racked boxes, generally from 2% to 12%, average 5% badly bruised for these boxes."

With respect to the grade of the apples the certificate states "Stock grade Washington State Extra Fancy, Fancy and 'C' Grade, dead ripe and bruised being factors of condition." Other evidence of record shows that 76 of the boxes were badly damaged.

6. Complainant at first refused, but later accepted, delivery of the apples, paid the purchase price plus transportation charges, and filed a claim against the carrier. The carrier refused to pay anything on this claim.

7. The apples shipped in car PFE 31919 were not so loaded and braced as to assure safe arrival at destination under ordinary conditions of transportation. Improper loading and bracing were the causes of the damage from excessive bruising referred to in Finding No. 5 above.



8. Complainant sustained damages as a result of improper loading and bracing, but there is insufficient evidence of record to establish the amount of such damage.

9. Informal complaint was made to the Regulatory Division on February 12, 1947, which was within 9 months after the cause of action accrued.

### CONCLUSIONS

The dispute here is over a carload of apples sold to complainant by respondent in July 1946. Respondent did not pack or load the apples, but bought them from another concern for delivery to complainant. When the shipment arrived at destination, Denver, Colorado, it was discovered that the center bracing had partially collapsed, resulting in shifting of the load in one end of the car and damage to some 76 boxes of the apples. Complainant accepted delivery of the apples and paid the purchase price, but only after notice to respondent that the shipment did not comply with the contract. Complainant asks for an award of reparation in the amount of \$1,364.76, which is alleged to be the difference between what the apples would have been worth if they had met contract specifications, and the market value of the apples actually delivered.

Respondent contends, but makes no particular point of the fact, that it did not load or even see the loaded car. In any event, this is not a valid defense to a claim based on improper loading. This was an f. o. b. sale. The definition of the term "f. o. b." in the regulations (7 CFR 46.24 (i)) provides that "the buyer assumes all risk of damage and delay in transit not caused by the shipper, irrespective of how the shipment is billed." In other words, the buyer is not liable for damage due to faulty loading. Each buyer's claim is against the seller from whom he bought, on down the line to the original seller and shipper.

Respondent also claims the car was loaded and braced in the usual and customary manner for the time, taking into consideration the shortage of lumber then existing. From the evidence submitted we have no hesitancy in concluding that the bracing was inadequate; that the car was not properly loaded; and that failure on the part of respondent to deliver a properly loaded car was in violation of section 2 of the act.

There remains the question of damages. The measure of damages for breach of warranty where the buyer accepts the goods is the difference between the value of the goods at the time of delivery to the buyer and the value that they would have had if they had met contract specifications. *The Auster Company et al. v. J. C. Watson Company*, 8 A. D. 798, 803; *Joseph Notarianni & Company v. Miller Fruit Com-*

*pany*, 8 A. D. 396, 401. In the present case, the value the apples would have had if they had met contract specifications can be determined from official market reports, but the value of the apples actually delivered is in doubt. In proper cases, the proceeds of resale may be accepted as indicating the reasonable value of the produce on the date of delivery. However, where the resale is not made promptly after arrival, or where, for some other reason, the resale price does not appear to reflect the reasonable value of the produce as of date of arrival, the proceeds of resale will not be accepted as evidence of the value of the goods on the date of delivery; see, for example, *C & S Produce Company v. L. N. Cox*, 8 A. D. 615, 619; *Morris Goldman, Inc. v. Mathew Mercurio*, 8 A. D. 609.

Complainant's claim is based upon the proceeds of resale, but such resales were made over a period of approximately three weeks. During this time a substantial decline occurred in the market. Also, the evidence shows that the apples were of a highly perishable kind, and should have been disposed of within a few days or a week after arrival. For these reasons the proceeds received on resale cannot be accepted as representative of the reasonable value of the apples upon arrival. There is little doubt that complainant suffered some damage because of improper loading, particularly with respect to the 76 boxes which were badly broken. However, sales figures on the 76 boxes were not segregated, so there is no evidence as to the amount for which these boxes were sold. Any estimate on our part as to the damages sustained from improper loading would be sheer guesswork. For lack of proof of the amount of complainant's damages resulting from respondent's violation of the act, the complaint should be dismissed. In view of our conclusion that respondent violated section 2 of the act, the facts should be published.

#### ORDER

The complaint is dismissed.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2329)

ROSENTHAL COMPANY, INC. v. EARL HAMLIN SPAULDING. PACA Doc. No. 5243. Decided January 4, 1950.

#### Failure To Pay Balance of Purchase Price—Default

Where complainant alleged that respondent failed to pay the full purchase price for three truckloads of produce and respondent failed to file an answer, held, that failure to file an answer constitutes an admission of the facts

alleged in the complaint and a waiver of oral hearing, and respondent's failure to pay the full purchase price is a violation of the act for which complainant should be awarded reparation for the amount of the unpaid balance of the purchase price, plus interest.\*

*Messrs. Foley and Foley*, of Chicago, Illinois, for complainant. *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

#### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). An informal complaint was received February 3, 1949. A formal complaint was filed October 18, 1949, alleging failure on the part of the respondent to pay the full purchase price for three truckloads of produce purchased from the complainant during October 1948. The Department made an investigation and a copy of its report of investigation was served upon complainant's attorney on November 18, 1949. On November 21, 1949, copies of the report of investigation and the formal complaint were served on the respondent.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complainant and a waiver of oral hearing. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

#### FINDINGS OF FACT

1. Complainant, Rosenthal Company, Inc., is a corporation whose post office address is 1425 South Racine Avenue, Chicago, Illinois.

2. Respondent is an individual, Earl Hamlin Spaulding, whose post office address is Searcy, Arkansas. At the time of the transactions here involved respondent was not licensed under the act, but was operating a business subject to license. Respondent subsequently applied for a license and paid arrearage fees covering the period when these sales were made.

3. On or about October 2, 1948, in the course of interstate commerce, complainant sold to the respondent one truckload of apples and tomatoes for the agreed purchase price of \$520.50.

4. On or about October 2, 1948, in the course of interstate commerce, complainant sold to respondent a truckload of apples and peaches at the agreed purchase price of \$474.25.

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

5. On or about October 6, 1948, in the course of interstate commerce, complainant sold to respondent one truckload of grapes, tomatoes, pickles, and peppers for the agreed purchase price of \$685.15.

6. The produce, which was of the kind, quality, grade and size called for in the contracts, was shipped from Benton Harbor, Michigan, to the respondent in Searcy, Arkansas, and accepted by the respondent in compliance with the terms of the contracts.

7. Respondent has paid complainant \$650 of the total purchase price for the three shipments of \$1,679.90, leaving an unpaid balance of \$1,029.90.

8. Informal complaint was received February 3, 1949, which was within nine months after the causes of action accrued.

### CONCLUSIONS

The failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, as provided in the rules of practice (7 CFR 47.8(c)). The facts thus admitted are that the respondent purchased three truckloads of produce from the complainant for a total purchase price of \$1,679.90; that the produce was shipped in interstate commerce and it was accepted by the respondent as conforming with the terms of the contracts; and that respondent has paid complainant \$650, leaving a balance due of \$1,029.90, no part of which has been paid. The failure of the respondent to pay the full purchase price is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$1,029.90, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$1,029.90, with interest thereon at the rate of 5 per cent per annum from November 1, 1948, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2330)

CAROLINA PRODUCE DISTRIBUTORS *v.* GILMORE PRODUCE. PACA Doc. No. 5250. Decided January 11, 1950.

### Failure To Pay Purchase Price—Default

Where complainant alleged that respondent failed to pay the purchase price for a truckload of potatoes and respondent failed to file an answer to the complaint, held, that respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint, and respondent's failure to

pay the purchase price is a violation of the act for which reparation should be awarded to complainant, with interest.\*

*Mr. Jack R. Edwards*, of Greenville, North Carolina, for complainant. *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). An informal complaint was received June 24, 1949. A formal complaint was filed November 14, 1949, alleging respondent's failure to pay for a truckload of potatoes purchased from complainant on or about May 21, 1949. A copy of the report of investigation was served upon complainant's attorney on November 21, 1949. On November 22, 1949, copies of the report of investigation and the formal complaint were served on the respondent.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8(c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint and a waiver of hearing. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

### FINDINGS OF FACT

1. Complainant is an individual, C. C. Hilton, trading as Carolina Produce Distributors, whose post office address is Greenville, North Carolina.

2. Respondent is an individual, Harold L. Gilmore, trading as Gilmore Produce, whose post office address is 512 Chestnut Street, Johnstown, Pennsylvania. At the time of the transaction complained of herein, respondent was licensed under the act.

3. On or about May 21, 1949, the parties entered into a contract for the sale by complainant to respondent of one truckload of potatoes, consisting of 98 100-pound sacks of grade U. S. No. 1 Red Bliss and 152 100-pound sacks of grade U. S. No. 1 Cobbler, at \$4.55 per sack delivered. The total purchase price was \$1,137.50.

4. On or about May 21, 1949, complainant shipped from Beaufort, North Carolina, to respondent in Johnstown, Pennsylvania, potatoes which complied with the contract specifications.

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

5. Respondent accepted the potatoes but failed and refused to pay to complainant the agreed purchase price, or any part thereof.

6. Formal complaint was received on November 14, 1949, which was within nine months after the cause of action accrued.

### CONCLUSIONS

The failure of respondent to file an answer to the formal complaint constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing as provided in the rules of practice (7 CFR 47.8 (c)). The facts thus admitted are that respondent purchased from complainant one truckload of potatoes at the agreed price of \$1,137.50; that complainant delivered the commodity in accordance with the terms of the contract; and that respondent accepted the shipment, but failed to pay any part of the purchase price. The failure of respondent to pay the purchase price is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$1,137.50, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$1,137.50, with interest thereon at the rate of 5 percent per annum from June 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2331)

TURNER'S BANANAS *v.* CAVE CITY FRUIT COMPANY. PACA Doc. No. 5252. Decided January 23, 1950.

### Failure To Pay Balance of Purchase Price—Default

Where complainant alleged that respondent failed to pay the full purchase price for a truckload of bananas and respondent failed to file an answer, held, that respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint, and its failure to pay complainant the full purchase price is a violation of the act for which complainant should be awarded reparation in the amount of the unpaid balance of the purchase price.\*

*Turner's Bananas*, of Atlanta, Georgia, complainant *pro se*. Mr. E. D. Mulville, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). An informal complaint was received July 27, 1949. A formal complaint was filed December 1, 1949, alleging failure on the part of the respondent to pay the agreed purchase price for a truckload of bananas. An investigation was made by the Department and a copy of the report of investigation was served on the complainant December 9, 1949. On December 10, 1949, copies of the report of investigation and the formal complaint were served on the respondent.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

### FINDINGS OF FACT

1. Complainant is an individual, Richard D. Turner, trading as Turner's Bananas, whose post office address is 1050 Murphy Avenue S. W., Atlanta, Georgia.

2. Respondent is an individual, B. L. Dennison, trading as Cave City Fruit Company, whose post office address is Cave City, Kentucky. At the time of the transaction complained of herein, respondent was licensed under the act.

3. On or about January 11, 1949, in the course of interstate commerce, complainant sold to respondent 8,449 pounds of bananas for a total purchase price of \$627.04.

4. The respondent accepted the bananas in accordance with the terms of the contract and transported them in interstate commerce from Atlanta, Georgia, to Cave City, Kentucky.

5. Respondent paid complainant \$200 on April 6, 1949, leaving an unpaid balance of \$427.04.

6. Informal complaint was received July 27, 1949, which was within nine months after the cause of action accrued.

### CONCLUSIONS

The failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint as provided in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that respondent purchased from complainant 8,449 pounds of bananas at the agreed price of \$627.04; that

respondent accepted the bananas in accordance with the terms of the contract; and that respondent has paid \$200 but has failed to pay any part of the unpaid balance of \$427.04. The record shows that on the date of purchase respondent gave complainant a check in the amount of \$627.04, and that this check was returned unpaid because of insufficient funds. Later, on January 28, 1949, respondent gave complainant another check in the amount of \$186.33, marked "Part settlement on load of bananas bought 1-11-1949", but this check was also returned unpaid because of insufficient funds. The \$200 payment was made April 6, 1949. The failure of the respondent to pay the full purchase price is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$427.04, with interest and the facts should be published.

### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$427.04, with interest thereon at the rate of 5 per cent per annum from February 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2332)

W. A. WHITE BROKERAGE COMPANY v. BELZER FRUIT COMPANY,  
PACA Doc. No. 5133. Decided January 23, 1950.

### Failure To Pay Balance of Purchase Price—Failure To Show Breach of Warranty—Excessive Decay Due to Nature of Commodity and Manner of Handling

Where complainant contracted late in the season to sell to respondent a carload of "fresh pack" apples and respondent unloaded the apples 5 days after arrival, placed them in cold storage, and later complained of excessive decay, held, that respondent has failed to show that complainant breached the contract since the decay was due to the nature of the apples and the manner in which they were handled by respondent and, therefore, complainant should be awarded reparation in the amount of the unpaid balance of the purchase price.\*

*W. A. White Brokerage Company*, of Minneapolis, Minnesota, complainant *pro se*.  
*Mr. David J. Smilow*, of Minneapolis, Minnesota, for respondent. *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.



### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Informal complaint was received on July 29, 1948, and the formal complaint was filed March 25, 1949. Copies of the complaint and report of investigation were served upon the respondent on May 11, 1949. On the same date, a copy of the report of investigation was served upon the complainant. Respondent filed its answer on June 1, 1949.

Complainant alleges that on or about April 19, 1948, it sold respondent 398 boxes of apples at \$2.60 per box f. o. b. shipping point; that the respondent accepted the apples; but that respondent made only part payment, leaving a balance due of \$497.50, which complainant seeks to recover.

Respondent claims breach of warranty in that the contract provided there would be "less than 1% decay," but that inspection of the apples after arrival showed an average of 50 percent decay, and that respondent did the best it could to salvage something out of the apples to mitigate damages.

Since the amount involved does not exceed \$500, the issues are being decided under the shortened procedure provided for in section 47.20 of the rules of practice (7 CFR 47.20). Complainant filed an opening statement of facts, respondent filed an answering statement and complainant filed a statement in reply.

### FINDINGS OF FACT

1. Complainant, W. A. White Brokerage Company, is a corporation whose address is 810 Pence Building, Minneapolis, Minnesota.

2. Respondent is a partnership composed of Benjamin Belzer and Meyer Belzer, doing business as Belzer Fruit Company, whose address is 216 North Sixth Street, Minneapolis, Minnesota. At the time of the transaction complained of herein, respondent was licensed under the act.

3. On or about April 16, 1948, Gwin, White and Prince, Inc., of Seattle, Washington, shipped car ART 28315, containing 798 boxes of Winesap apples, from Peshastin, Washington. Inspection at point of shipment showed the apples were "mostly firm some firm ripe less than 1% decay."

4. On or about April 19, 1948, Gwin, White and Prince, Inc., sold the carload of apples, then in transit, to complainant. On May 4, 1948, complainant made full payment to Gwin, White and Prince, Inc.

5. On or about April 19, 1948, complainant contracted to sell to respondent 398 boxes of fresh pack Washington Winesap apples, Com-

bination Extra Fancy and Fancy at \$2.60 per box f. o. b. shipping point, being a portion of the apples contained in car ART 28315.

6. Car ART 28315 arrived in Minneapolis, Minnesota, on April 22, 1948. A private inspection certificate obtained in Minneapolis on that date described the apples as follows:

"Stock up to grade stock generally clean, fairly bright, fair to good color, stock firm full to full ripe about 1% decay 3% slight scald some of stock showing watercore about 15% packing bruises stock well sized generally tight pack."

7. The apples were accepted by respondent but were not unloaded from the car until on or about April 27, 1948.

8. Respondent obtained a government inspection on May 7, two weeks after arrival of the shipment, of approximately 150 boxes of apples, which were then in respondent's warehouse and which respondent advised the inspector were from car ART 28315. The certificate issued shows that decay in these apples ranged from 35 percent to 75 percent, averaging 50 percent.

9. Complainant paid the freight and other charges on the shipment and respondent's obligation to complainant under the contract totaled \$1,393.42. Respondent has paid complainant \$895.92, leaving a balance due of \$497.50, no part of which has been paid.

10. Informal complaint was received July 29, 1948, which was within nine months after the cause of action accrued.

### CONCLUSIONS

The apples with which we are here concerned were a part of a pool car shipment, respondent being one of three purchasers. There is no dispute in this case as to the terms of the contract. It was a sale of 398 boxes of fresh pack Washington Winesap apples. Combination Extra Fancy and Fancy, at \$2.60 per box, f. o. b. shipping point. A copy of a private inspection report disclosed that the apples, upon arrival in Minneapolis, Minnesota, on April 22, 1948, contained about 1% decay. Two weeks later, on May 7, 1948, respondent had an inspection made of approximately 150 boxes of Winesap apples, which respondent stated to the inspector were a part of the 398 boxes unloaded from car ART 28315. This inspection showed 35 to 75 percent decay, average about 50 percent. The only question is whether complainant delivered apples which met contract requirements.

These apples were shipped late in the season. The contract specified that the apples were a "fresh pack". Complainant states in its sworn statement in reply that the quoted words meant in the trade that the apples had been packed some seven months after harvest and they must be handled with dispatch. There is no evidence to the contrary. Nevertheless, respondent allowed the apples to remain in

the car for 5 days after arrival and it then placed the major portion of the apples in cold storage. At some undisclosed time prior to May 7, 1948, respondent complained of excessive decay. In our opinion, the evidence establishes that the apples complied with the terms of the contract at the time of arrival. The deterioration that occurred after arrival was presumably no more than was to be expected in view of the nature of the apples and the way they were handled.

After the decay was discovered the respondent complained to the complainant who obtained from Gwin, White and Prince, Inc., an allowance of 25 cents per box, or \$99.50. This amount was paid to and accepted by respondent. It is not shown whether this payment was in full settlement of respondent's claim under the contract.

We conclude that the respondent has failed to show that complainant breached the contract in any respect. Respondent's failure to pay the full purchase price is in violation of section 2 of the act. Reparation should be awarded complainant in the amount of the unpaid balance of \$497.50, with interest, and the facts should be published.

#### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$497.50, with interest thereon at the rate of 5 percent per annum from May 1, 1948, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2333)

PESHASTIN FRUIT GROWERS ASSOCIATION *v.* MATHEW MERCURIO.  
PACA Doc. No. 5195. Decided January 30, 1950.

#### Cancellation of Contract Treated as Unlawful Rejection

Where complainant's agent contracted to sell apples through a broker to respondent, subject to respondent's approval of shipping point inspection, and respondent approved the inspection but the following day cancelled the contract, held, that the cancellation of the contract may be treated as a rejection of the apples without reasonable cause and complainant should be awarded reparation for the loss sustained on the resale of the apples.\*

*Mr. A. M. Groseclose*, of Seattle, Washington, for complainant. *Mr. Louis Gelbman*, of Youngstown, Ohio, for respondent. *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

\* Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Complainant's agent filed an informal complaint on March 21, 1949, and a formal complaint was filed by complainant on August 8, 1949. A report of investigation was made by the Department and copy thereof was served on the complainant's attorney on October 4, 1949. Copies of the report of investigation and the formal complaint were served upon respondent on September 30, 1949.

Complainant alleges that on or about March 2, 1949, it sold to respondent, through a broker, one carload of apples at \$2.75 per box, or \$2,194.50, "f. o. b. shipping point, Peshastin, Washington, subject to approval present Government inspection." Complainant alleges further that the results of the Government inspection were wired to the broker; that on March 4, 1949, the broker wired that respondent approved the inspection and desired shipment the next day under initial ice; but that on March 5, 1949, respondent notified complainant to cancel the contract. An award of reparation is requested in the amount of \$119.70, the difference between the contract price and the net proceeds received by complainant on a resale of the apples.

In the answer filed October 18, 1949, respondent admits that he entered into the contract alleged by complainant, but respondent denies that he authorized the broker to send the telegram of March 4, 1949. Respondent alleges that he received the broker's confirmation of sale which contained the results of the inspection; that he was not satisfied with the quality and condition of the apples as disclosed by the inspection; and that he advised the broker he would not purchase the apples.

Since the amount involved does not exceed \$500, the issue is decided under the shortened procedure provided for in section 47.20 of the amended rules of practice. The complainant, through its attorney, advised the Department on November 9, 1949, that it wished its complaint and exhibits to be considered as its opening statement of facts. The respondent, through his attorney, advised the Department that he desired to have his answer considered as respondent's answering statement of facts.

### FINDINGS OF FACT

1. Complainant, Peshastin Fruit Growers Association, is a corporation whose post office address is Peshastin, Washington.

2. Respondent is an individual, Mathew Mercurio, whose post office address is 201 West Front Street, Youngstown, Ohio. At the time of the transaction complained of herein respondent was licensed under the act.

3. On or about March 2, 1949, the parties entered a contract for the sale by complainant and the purchase by respondent of a carload of 798 boxes of Washington State C grade Winesap apples, sizes 88 to 163 at \$2.75 per box or \$2,194.50, f. o. b. shipping point, Peshastin, Washington, subject to respondent's approval of the Federal shipping point inspection certificate. It was agreed that the apples, if the certificate was approved, should be shipped from Peshastin to Youngstown, Ohio, on March 5, 1949. In this transaction, Gwin, White and Prince, Inc., 812 Skinner Bldg., Seattle, Washington, acted as agent for complainant and Tri-State Sales Agency, 21st and Pike Streets, Pittsburgh, Pennsylvania, acted as broker.

4. The apples in car FGEX 35233 were Federally inspected at Peshastin on March 3, 1949, and certified as Washington C grade. The certificate as to quality and condition reads:

"15% to full red color, approximately  $\frac{1}{2}$  of stock shows 25 to 50% red. Defects of grade average within tolerances.

"Apples are mostly firm, some firm ripe 2% Blue Mold decay."

5. The quality and condition findings of the certificate were sent to the broker by night letter on March 3, 1949. The broker, Tri-State Sales Agency, read the telegram to respondent on March 4, 1949, and respondent approved the inspection, agreed to accept the apples, and requested that the apples be shipped under initial ice. As a result of the conversation, the broker wired Gwin, White and Prince, Inc., complainant's agent, that respondent approved the inspection and requested shipment. On the same day, March 4, 1949, at 4:25 p. m., the broker wired respondent as follows:

"REPHONE TOLD GWIN WHITE PRINCE YOU APPROVED SEA WINESAP INSPECTION 15% TO FULL RED APPROXIMATELY HALF STOCK 25-50 PERCENT RED MOSTLY FIRM SOME FIRM RIPE 2% DECAY INSTRUCTED THEM SHIP SATURDAY INITIAL ICE THANKS"

This wire was received by respondent between 7:09 a. m. and 7:21 a. m. on March 5, 1949. At 8:14 a. m., March 5, 1949, respondent wired the broker to cancel the purchase because he did not like the findings of the inspection. Complainant refused to accept cancellation.

6. As a result of respondent's request for cancellation, complainant's agent instructed the broker to resell the apples in car FGEX 35233. They were sold to Erenbaum Produce Company in Pittsburgh, Pennsylvania, for \$2.60 per box, f. o. b., or \$2,074.80. This was \$119.70 less than the purchase price agreed upon by complainant and respondent.

7. The respondent has not paid the \$119.70 loss sustained by the complainant, or any part thereof.

8. Informal complaint was received March 21, 1949, which was within nine months after the cause of action accrued.

## CONCLUSIONS

The contract in this proceeding was contingent upon respondent's approval of the quality and condition of the apples as disclosed by a Federal shipping point inspection certificate. On March 3, 1949, complainant's agent sent to the broker the following telegram:

"REFERENCE SEA WINESAPS WILL INSPECT 15% TO FULL RED APPROXIMATELY HALF STOCK 25-50% RED MOSTLY FIRM SOME FIRM RIPE 2% DECAY. WIRE APPROVAL MERCURIO YOUNGSTOWN."

By telegram dated March 4, 1949, the broker replied: "MERCURIO SAYS OKAY SHIP SATURDAY INITIAL ICE." On March 5, Mercurio wired the broker "SORRY YOUNG CANCEL CAR SAPS DO NOT LIKE INSPECTION." The broker then wired complainant's agent "JUST RECEIVED WIRE MERCURIO CANCELING ORDER CAR SAPS DON'T SHIP." Complainant refused to agree to cancellation because the car had already been loaded.

The issue joined by the pleadings is whether respondent told the broker that he approved of the inspection. The only statements of the broker and respondent in this respect are contained in their letters received by the Department during the investigation of the informal complaint. In a letter dated March 26, 1949, S. M. Young, of Tri-State Sales Agency, stated "I reached Mercurio around 4:00 p. m. March 4th and read him the inspection exactly as it was telegraphed to us and he approved." Respondent stated in a letter dated May 17, 1949, that:

"On or about March 4, Mr. Young from the Tri-State Sales Agency called me and wanted to sell me a car of apples. On the following day around 4:30 PM he gave me the Manifest and Inspection. I told him then I didn't like the inspection as it showed too much decay and the fruit was ripe, but he kept on trying to convince me that it was a good car of apples. Finally I told him I would probably take the car but I would let him know in the morning. Around 8:30 on the morning following, I wired the Tri-State to forget the car as it showed too much decay."

While the statements of these persons are in conflict, it is our belief that that of the broker is entitled to the greater weight. The broker's position is substantiated by the telegrams sent to complainant's agent and to respondent within a short time after the telephone conversation with respondent. It is difficult to believe that the broker would say therein that respondent had approved the inspection and also had given specific icing instructions if, in fact, respondent had not told the broker these things. Furthermore, it seems to us that respondent, if the facts were as he stated, would have denounced the statements in the broker's confirming telegram. Instead, respondent wired the broker to cancel the shipment. It is concluded that respondent did

approve the inspection. Consequently, respondent's attempt to cancel the contract through the broker the following day may be treated as a rejection of the apples, *Colorado Produce Distributors v. Brown Brokerage Co.*, 5 A. D. 388.

The complainant seeks damages to the extent of the loss sustained on the resale of the apples. There is information in the file which tends to show reasonable diligence was exercised in an effort to obtain the best price possible for apples.

We conclude that respondent contracted to purchase apples from complainant; that respondent attempted to cancel the contract; and that such attempt constituted rejection of the commodity without reasonable cause in violation of section 2 of the act. We further conclude that the \$119.70 loss sustained by complainant is a proper measure of damages and that complainant should be awarded reparation in that amount, with interest, and the facts should be published.

#### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$119.70, with interest thereon at the rate of 5 per cent per annum from April 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2334)

**ROCKY FORD ONION GROWERS COOPERATIVE ASSOCIATION v. BAILEY PRODUCE Co., INC.** PACA Doc. No. 5258. Decided January 30, 1950.

#### Failure To Pay Balance of Purchase Price—Default

Where respondent purchased a truckload of onions from complainant but failed to pay the full purchase price, and failed to file an answer to the complaint, held, that its failure to file an answer constitutes an admission of the facts alleged in the complaint and complainant is entitled to an award of reparation in the amount of the unpaid balance of the purchase price, plus interest.\*

*Rocky Ford Onion Growers Co-op Association*, of Rocky Ford, Colorado, complainant *pro se*. *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

### PRELIMINARY STATEMENT

An informal complaint was received December 20, 1948, and a formal complaint was filed November 7, 1949, in this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). It is alleged in the complaint that the respondent failed to pay the full purchase price for a truckload of onions purchased from the complainant on or about September 25, 1948. An investigation was made by the Department and a copy of the report thereof was served on the complainant December 5, 1949. On the same day, copies of the report of investigation and the formal complaint were served on respondent.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter, and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint. The respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

### FINDINGS OF FACT

1. Complainant, Rocky Ford Onion Growers Cooperative Association is an unincorporated cooperative association, whose post office address is 101 South 10th Street, P. O. Box 509, Rock Ford, Colorado.

2. Respondent, Bailey Produce Co., Inc., is a corporation whose address is 130 North Main Street, Paris, Texas. At the time of the transaction complained of herein, respondent was licensed under the act.

3. On or about September 25, 1948, in the course of interstate commerce, complainant sold to respondent a truckload of onions consisting of 400 bags of U. S. No. 1 medium yellows at 85 cents a bag and 200 bags of commercial yellows at 60 cents a bag, or a total purchase price of \$460, f. o. b. Rocky Ford, Colorado.

4. On or about September 25, 1948, onions meeting contract requirements were shipped from Rocky Ford, Colorado, to Paris, Texas, and were accepted by the respondent.

5. Respondent paid the complainant \$100, leaving a balance due of \$360, no part of which has been paid.

6. Informal complaint was filed within nine months after the cause of action accrued.

### CONCLUSIONS

The failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint, as provided in the rules of practice (7 CFR 47.8 (c)).



The facts thus admitted are that the respondent purchased from complainant a truckload of onions at the agreed purchase price of \$460; that complainant delivered to respondent onions which complied with the terms of the contract; and that respondent has paid \$100, but has failed to pay any part of the unpaid balance of \$360. The respondent gave the complainant a check for \$460, dated September 25, 1948, but this check was returned by the bank marked "insufficient funds". On March 30, 1949, respondent paid \$700 to the Regulatory Division of the Department of Agriculture, which amount was prorated among several shippers who had filed complaints. Of this \$700, \$100 was allotted and paid to this complainant on April 13, 1949. The failure of the respondent to pay the full purchase price is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$360, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$360, with interest thereon at the rate of 5 percent per annum from October 1, 1948, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2335)

**WEBSTER & KENDALL COMPANY v. AMERICAN STEAK COMPANY. PACA**  
Doc. No. 5260. Decided January 30, 1950.

### Failure To Pay Brokerage Fee

Where complainant sold strawberries for respondent but respondent failed to pay complainant brokerage and failed to answer the complaint, held, that respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, and reparation should be awarded complainant in the amount of the brokerage due, plus interest.\*

*Webster & Kendall Co.*, of Los Angeles, California, complainant *pro se*.  
*Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). An informal complaint was filed July 30, 1947. Formal complaint

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

was filed October 6, 1949, alleging failure on the part of respondent to pay brokerage of \$826.80 for strawberries sold for respondent on or about October 18, 1946, to Golden State Co., Ltd., 1120 Towne Avenue, Los Angeles, California. A copy of the report of investigation made in connection with this complaint was served upon complainant on October 17, 1949. Copies of the report of investigation and the formal complaint were served upon the respondent's attorneys on December 10, 1949.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint and a waiver of oral hearing. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

#### FINDINGS OF FACT

1. Complainant, Webster & Kendall Company, is a partnership composed of Frank C. Webster and Morton Kendall, whose post office address is 1315 East 7th Street, North Angus, California.

2. Respondent, American Steak Company, is a corporation whose last known address is 2448 Broadway, Kansas City, Missouri. At the time of the transaction involved herein, respondent was not licensed under the act but was subject to license.

3. On or about October 18, 1946, respondent employed complainant as its broker to assist in negotiating the sale of 1,572 30-pound tins of 4 x 1 whole frozen Blakemoore strawberries. Respondents agreed to pay complainant two cents per pound, as brokerage.

4. On or about October 18, 1946, complainant sold 1,378 30-pound tins of 4 x 1 whole Blakemoore strawberries to Golden State Co., Ltd., 1120 Towne Avenue, Los Angeles, California, for a total price of \$14,882.40. The sale was in accordance with the instructions of respondent.

5. The strawberries were shipped in car PFE 52454 from Kansas City to Los Angeles. The purchaser accepted the shipment and paid the full purchase price. Respondent has not paid any part of the brokerage commission of \$826.80 due complainant.

6. Informal complaint was filed within nine months after the cause of action accrued.

#### CONCLUSIONS

The failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing as provided in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that, pursuant to a contract between parties, complainant sold for respondent 1,378 30-pound tins of strawberries for \$14,882.40; that the purchaser accepted the shipment and paid respondent; and that the agreed brokerage of \$826.80 is due and owing to complainant from respondent. The failure of respondent to pay complainant the agreed brokerage is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$826.80, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$826.80, with interest thereon at the rate of 5 percent per annum from October 18, 1946, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2336)

MIDWEST GROCERY COMPANY *v.* EVANSVILLE FRUIT COMPANY. PACA  
Doc. No. 5262. Decided January 31, 1950.

### Jurisdiction of Secretary—Balance of Purchase Price—Personal Loan Not Within Purview of Act—Default

Where complainant sold vegetables to respondent and advanced money to it, but respondent failed to pay the full purchase price and repay complainant the cash advanced for respondent to pay its driver, and respondent failed to file an answer, held, that its failure to file an answer admits the facts alleged in the complaint, and complainant should be awarded reparation in the amount of the unpaid balance of the purchase price but complainant could not recover for the personal loan, since the latter is not within the purview of the act and therefore not within the jurisdiction of the Secretary.\*

*Midwest Grocery Co.*, of Chicago, Illinois, complainant *pro se*. *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). An informal complaint was received June 7, 1949. A formal complaint was filed August 16, 1949, alleging failure on the part of the respondent to pay the purchase price of \$355.25 for a truckload of

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

vegetables purchased from the complainant on or about April 18, 1949, and failure to repay \$10 cash advanced for respondent to its driver. An investigation was made by the Department and a copy of the report of investigation was served on complainant September 19, 1949. On the same date, copies of the report of investigation and the formal complaint were served on respondent.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

#### FINDINGS OF FACT

1. Complainant, Midwest Grocery Company, is a cooperative organization whose post office address is 33rd Street at South Western Avenue, Chicago 8, Illinois.

2. Respondent is an individual, Wilbur W. Lawrence, trading as Evansville Fruit Company, whose post office address is 310 N. W. 9th Street, Evansville, Indiana. At the time of the transaction complained of herein, respondent was licensed under the act.

3. On or about April 18, 1949, in the course of interstate commerce, complainant sold to respondent 30 crates of lettuce, U. S. No. 1 quality, at \$5.50 per crate, 10 crates first quality carrots at \$4.15 per crate, 100 bags U. S. No. 1 yellow onions at \$1.35 per bag, and 5 crates radishes at \$2.75 per crate, or a total purchase price of \$355.25.

4. Respondent accepted the produce as being in conformance with the terms of the contract and transported the vegetables from Chicago, Illinois, to Evansville, Indiana, in its truck.

5. The respondent has paid \$75, leaving an unpaid balance of \$280.25.

6. Informal complaint was made within nine months after the cause of action accrued.

#### CONCLUSIONS

The failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint as provided in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that respondent purchased from complainant vegetables at the agreed price of \$355.25; that respondent accepted the vegetables in accordance with the terms of the contract; that complainant advanced \$10 to the respondent's trucker at respondent's request; and that respondent has not paid any part of the total

obligation of \$365.25. The respondent, however, paid \$25 on October 10, 1949, and \$50 on November 1, 1949, reducing the amount due from \$365.25 to \$290.25. The failure of the respondent to pay the purchase price of the vegetables is in violation of section 2 of the act. As to the \$10 advance made by complainant to respondent, this appears to have been a personal loan over which we have no jurisdiction under the act. Complainant should be awarded reparation in the amount of \$280.25, with interest, and the facts should be published.

### **ORDER**

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$280.25, with interest thereon at the rate of 5 per cent per annum from May 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2337)

PACA Doc. No. 4850.\* Decided January 31, 1950.

### **Dismissal—Failure To Show Breach of Contract**

Where complainant-buyer failed to show a breach of contract on part of respondent-seller with respect to a lot of "no label" tomatoes, which were sold without specification as to grade, and complainant failed to prove by a preponderance of the evidence that another lot of Tampico brand tomatoes was not, in fact, U. S. No. 1 grade when shipped, it is held, that the complaint should be dismissed.\*\*

### **Confirmation of Sale—Effect of Failure To Make Timely Objection**

The terms of a contract are deemed to be as set forth in the telegraphic confirmation of sale unless the party receiving such confirmation makes timely objection thereto.\*\*

### **Grade of Produce Under Term of F. O. B. Acceptance Final**

In an f. o. b. acceptance final contract for U. S. No. 1 tomatoes, the tomatoes must be of U. S. No. 1 grade at shipping point.\*\*

### **Evidence—Condition at Shipping Point Not Established by Official Destination Inspection**

The fact that an official destination inspection shows decay in excess of destination tolerance does not establish that the commodity was not of U. S. No. 1 grade at shipping point.\*\*

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\*As explained in Prefatory Note, the identities of the parties are not disclosed.—Ed.

\*\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

*Mr. David Friedman*, of Pittsburgh, Pennsylvania, for complainant. *Mr. Alexander Golbus*, of Chicago, Illinois, for respondent. *Mr. Gilbert A. Horn*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*), involving the sale of a carload of Mexican tomatoes. Complainant seeks to recover damages allegedly sustained as a result of respondent's failure to ship the kind and quality of tomatoes specified by the contract. Informal complaint was received by the Regulatory Division, Fruit & Vegetable Branch, on March 10, 1947, and a formal complaint was filed on November 5, 1947. A copy of the formal complaint together with a copy of the report of investigation prepared by the Regulatory Division was served by registered mail on respondent on November 24, 1947. Complainant was served with a copy of the report of investigation on November 24, 1947. Respondent's answer was filed on December 11, 1947.

Oral hearing was held on December 28, 1948, in Indianapolis, Indiana. Both parties were represented by counsel. No witnesses appeared for complainant at the hearing. The oral testimony of \* \* \* and the depositions of two other witnesses were received on behalf of the respondent. Complainant was granted leave to present the depositions of other witnesses after the hearing was completed, for the purpose of proving damages, and two such depositions were filed.

### FINDINGS OF FACT

1. Complainant \* \* \*, is a partnership composed of \* \* \*, whose business address is \* \* \*.

2. Respondent \* \* \*, is a partnership composed of \* \* \*, whose last known business address is \* \* \*. Respondent was licensed under the act at the time of the transaction here involved.

3. On or about January 6, 1947, respondent, over the telephone, sold to complainant one carload of Mexican tomatoes in car ART 21292, consisting of 550 lugs of U. S. No. 1 Tampico brand tomatoes at \$4.75 per lug, f. o. b. Laredo, Texas, and 230 lugs "no label" tomatoes at \$4.40 per lug, f. o. b. Laredo, Texas. The carload was sold on the basis of f. o. b. acceptance final. On the same date, respondent sent complainant a telegraphic confirmation of sale setting forth all the terms of the transaction.

4. On January 3, 1947, a platform inspection was made of 550 lugs of Tampico brand tomatoes and the same were certified as U. S. No.

1 by the Federal-State Inspector. These tomatoes were loaded into car ART 21292 immediately after the platform inspection, together with 230 lugs of uninspected "no label" tomatoes. This car left Laredo on or about January 4, 1947.

5. Car ART 21292 arrived at Pittsburgh, Pennsylvania, on or about January 10, 1947, and the tomatoes were accepted and paid for by complainant. Complainant unloaded 330 lugs of tomatoes from the car on the day of arrival.

6. After the car was partially unloaded, complainant ordered a Federal inspection of the 450 lugs of Tampico brand tomatoes remaining in the car. The inspection report dated January 11, 1947, showed grade defects to be within tolerance but showed that the lading "now fails to grade U. S. No. 1 only account decay." The condition of the lading was reported as follows:

"In most samples decay ranges from 3 to 20%, many none, averaging approximately 10%. Decay is *Macrosporium Rot*, various stages. In addition average 4% sunken discolored areas generally occurring on shoulders."

7. On January 16, 1947, complainant advised respondent by letter that unless respondent was able to furnish a Federal inspection certificate showing the carload to be U. S. No. 1 at shipping point, the car would be sold for respondent's account.

8. Informal complaint was filed within nine months after the alleged cause of action accrued.

### CONCLUSIONS

Complainant contends that in the oral conversations leading up to the sale of this carload of tomatoes, respondent represented that the entire carload had been inspected at shipping point and carried with it a U. S. No. 1 inspection certificate, and that complainant's purchase of the shipment on an f. o. b. acceptance final basis was induced by this representation. After delivery and acceptance of the car, it was found that there had been no inspection of the entire car at shipping point. Therefore complainant concludes that false and misleading statements were made by the respondent in violation of the Act, and were the direct and proximate cause of the loss sustained by the complainant, for which reparation is sought.

Respondent defends on the ground that the contract required only the 550 lugs of Tampico brand tomatoes to grade U. S. No. 1, the "no label" lot having been sold without representation as to grade. Thus the question of what were the terms of the contract forms the principal issue in the case.

The only significant evidence on the point is the telegraphic confirmation. Complainant received this confirmation on the day of the

transaction, and at no time thereafter denied that it was a true statement of the agreement of the parties. This confirmation reads in part as follows:

"CONFIRMING PER TELEPHONE CONVERSATION CAR MEXICAN TOMATOES OUT LAREDO 4TH ART 21292 550 LUGS US ONE TAMPICO BRAND 4.75 FOB 230 LUGS NO LABELS 4.40 FOB BASIS EACH FOB ACCEPTANCE FINAL."

There is nothing in this confirmation which sustains complainant's contention that the shipment was to carry a carload shipping point inspection. Rather, it treats with the two lots in the shipment separately. The Tampico brand tomatoes were sold specifically as U. S. No. 1, whereas the lower priced "no label" tomatoes were sold without representation or warranty as to grade. Since complainant failed to object to the terms of the confirmation, and received and accepted the shipment in apparent reliance thereon, it is concluded that the confirmation states the true agreement of the parties.

This is an action for damages resulting from respondent's alleged violation of the Act through a breach of contract. Therefore the burden of proof is on the complainant to show that the commodity tendered did not meet contract requirements.

Clearly complainant has no cause of action with respect to the 230 lugs of "no label" tomatoes, since under the terms of the contract this lot was sold without specification as to grade, and no evidence was offered to show any breach with respect to this lot.

Complainant would have a cause of action with respect to the Tampico brand tomatoes which were sold as U. S. No. 1 grade if it could prove by a preponderance of the evidence that this lot was not, in fact, of U. S. No. 1 grade when shipped.

The shipping point inspection certificate is prima facie evidence of the fact that these tomatoes were of U. S. No. 1 grade on the platform at 6:45 p. m., January 3, 1947. Both the deposition of \* \* \* and that of \* \* \* include statements to the effect that the lot was loaded into the car immediately after inspection. Complainant offers no evidence to show that this was not the case. This car left Laredo on the following day, January 4th, but the hour of the departure is not shown. From the evidence presented, there is no basis for concluding that the lot of Tampico brand tomatoes was not of U. S. No. 1 grade when shipped. Nor does a consideration of the destination inspection, made on January 11, 1947, seven days after shipment, alter this conclusion. It was not an appeal inspection and thus does not, of itself, reverse the shipping point inspection. It covered only a part of the lot, having been made after the car was partially unloaded, and thus may not have been representative of the entire lot.



The specific results do not necessarily challenge the validity of the shipping point determination that the lot was of U. S. No. 1 grade. The destination inspection reveals that permanent grade defects were within tolerance and the per cent of decay, the only account on which the lot failed to grade U. S. No. 1 at destination, was not so greatly in excess of the destination tolerance for decay as to indicate that the tomatoes failed to grade U. S. No. 1 at the time of shipment.

It is concluded that complainant has failed to sustain the burden of proving that respondent breached the contract in any respect. Accordingly, the complaint should be dismissed.

### ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

(No. 2338)

PACA Doc. No. 5006.\* Decided January 31, 1950.

### Dismissal—Failure To Ship Within Reasonable Time

Where respondent-buyer ordered from complainants frozen berries for prompt shipment and 35 days later agreed to increase its order to assure shipment, but about 34 days later respondent cancelled the order because the berries had not been shipped, held, in an action by complainant for damages, that complainant failed to ship the berries within a reasonable time so that respondent's cancellation was not without reasonable cause, and the complaint should be dismissed.\*\*

### Dismissal—Effect of Breach of Primary Contract Upon Guaranty Contract

Where respondent, the seller's broker, agreed to guarantee payment of price to be paid by buyer under contract to purchase berries from seller, which contract the buyer cancelled because the seller failed to ship within reasonable time, held, in an action by the seller against the broker under guaranty contract, that, since the primary contract is unenforceable because of the seller's breach, the broker is under no obligation to pay and the complaint should be dismissed.\*\*

Complainants *pro se*. *Mr. Sidney E. Stephens*, of Detroit, Michigan, for respondent. *Mr. Edward A. Smith*, of Detroit, Michigan, for respondent. *Mr. Gilbert A. Horn*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

\*As explained in Prefatory Note, the identities of the parties are not disclosed.—Ed.

\*\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Informal complaint was received by the Regulatory Division, Fruit and Vegetable Branch, on April 29, 1947, and formal complaint was filed on February 17, 1948. Copies of the formal complaint, together with copies of the report of investigation prepared by the Regulatory Division, were served upon respondents \* \* \*, and \* \* \*, on July 17 and August 30, 1948, respectively. Copies of the report of investigation were also served upon complainants \* \* \* and \* \* \*, on July 22 and July 20, 1948, respectively. Respondent \* \* \* filed an answer on August 9, 1948, and an answer was filed on behalf of respondent \* \* \* on September 16, 1948.

This proceeding involves a shipment of frozen berries allegedly sold by \* \* \*, as agent for \* \* \*, and \* \* \*. The alleged sales were made to \* \* \*, through \* \* \*, a broker. Complainants allege that respondent \* \* \*, rejected the shipment upon arrival without reasonable cause and that it is liable for the loss which resulted from a resale. It is alleged further that respondent \* \* \* is liable in the alternative to \* \* \* under a written guarantee made by \* \* \* to pay the drafts for the purchase prices in the event that \* \* \*, did not pay them.

Respondent \* \* \* alleges that the complainants did not comply with the provisions of the contract of purchase, in that they failed to make prompt delivery, as required by the contract, and failed to deliver merchandise of the kind, quality and condition specified in the contract. \* \* \* defended on the ground that its guaranty was applicable only in the event respondent \* \* \* accepted the goods and failed to pay the drafts issued thereon.

Oral hearing was held at Detroit, Michigan, on March 17, 1949. \* \* \* and \* \* \* appeared and testified on behalf of both complainants. Respondent \* \* \* was represented by counsel and presented the testimony of \* \* \*. Respondent \* \* \* was also represented by counsel, but offered no testimony at the hearing.

**FINDINGS OF FACT**

1. Complainant, \* \* \*, is a corporation whose address is \* \* \*. Complainant, \* \* \*, is a corporation, whose address is \* \* \*.

2. Respondent, \* \* \*, is a corporation whose address is \* \* \*. The respondent was licensed under the act at the time of the trans-

actions here involved. Respondent \* \* \* is a corporation, whose address is \* \* \*. This respondent was not licensed but was subject to license under the act at the time of the transactions here involved. It subsequently obtained a license and paid arrearage covering the period from August 1945 to December 1946.

3. On or about July 31, 1946, \* \* \* placed an order with \* \* \*, a broker, for 300 twenty-five pound tins of frozen boysenberries at 29 cents per pound and 227 thirty-pound tins of frozen strawberries at 41 cents per pound f. o. b., Portland, Oregon. The order was placed with the express understanding that the same would be sufficient to complete a pool car from the West Coast and that shipment would be made promptly.

4. By telegram dated July 31, 1946, \* \* \* advised \* \* \* of the order of \* \* \*. \* \* \* confirmed the order by telegram on August 5, stating that a prompt car would be arranged for. On August 6, \* \* \* issued a written memorandum of the sale, showing the terms of payment as "draft" and the terms of shipment as "prompt car". On August 9, \* \* \* issued a written memorandum of sale in which it was shown that the \* \* \* was acting for \* \* \*, and the terms as to "when ship" were shown as "for immediate draft against non-negotiable warehouse receipts". A copy of this memorandum was sent to \* \* \*, accompanied by a letter explaining that the shipper, \* \* \*, insisted on the terms of payment stated therein.

5. On August 12, 1946, \* \* \* issued an invoice directly to \* \* \*, for the berries, and showed the terms of payment as "SD/WR" [sight draft warehouse receipt] together with a notation that the berries were in cold storage at Portland, Oregon, first months storage for seller's account and additional storage for buyer's account.

6. \* \* \*, refused to pay the draft which accompanied the invoice and notified \* \* \*, that the berries were not purchased on the basis set forth in the invoice, and that it would not and could not pay the draft until the merchandise arrived at Detroit.

7. On or about September 4, 1946, \* \* \*, informed \* \* \*, that the berries had not been shipped because the shipper had not, as yet, sufficient orders to fill the pool car, and offered for sale 200 fifty-pound tins of blackberries which would complete the pool car. \* \* \*, agreed to purchase the additional 200 tins of berries at 20 cents per pound with the understanding that there would be no further delay in shipping the berries, and payment of both orders would be by sight draft against shipping documents.

8. On September 4, 1946, \* \* \* confirmed the additional order of blackberries by telegram, and advised that the blackberries were

being packed and that the entire carload would be shipped in about ten days. The telegram further stated that the draft on the blackberries would be drawn against shipping documents, but that the draft on the boysenberries and strawberries ordered earlier must be against warehouse receipts. The blackberries were sold by \* \* \* as agent of complainant \* \* \*.

9. On September 10, \* \* \*, advised \* \* \* by telegram that \* \* \* would pay for the boysenberries and strawberries by sight draft only. This message was answered by \* \* \* by telephone in which \* \* \* was advised that the shipper of the boysenberries and strawberries insisted on the terms "draft against non-negotiable warehouse receipts". In order to get the parties together, \* \* \* agreed with \* \* \* to guarantee the payment of the draft on the earlier order if the same was drafted against shipping documents. On the strength of this guarantee, \* \* \* guaranteed the payment of the draft to \* \* \*, and subsequently paid the invoice price to \* \* \*.

10. On September 25, 1946, \* \* \* issued shipping instructions to the cold storage warehouse calling for the pool car shipment of the \* \* \* order and several other orders.

11. During the early part of October 1946, \* \* \*, sent a letter to \* \* \* cancelling its order and advising that it had purchased its needs of frozen berries elsewhere. \* \* \* relayed this cancellation to \* \* \* on October 8, 1946, at a time when the loading of the pool car had already commenced, but had not been completed. \* \* \* immediately notified \* \* \* by telegram that it would be impossible to stop shipment of the car, and that the guarantee to pay the drafts on the car would be enforced.

12. The pool car was shipped on October 9, 1946, consigned to \* \* \*, "stop for partial unloading at Milwaukee, Wisconsin, and arrived in Detroit for unloading on October 26. An examination of the car at Detroit by that company revealed that there had been considerable damage to the shipment, many of the tins being unlidded and dented, and the blackberries had a slight fish odor.

13. \* \* \* made demands on \* \* \* for payment of the invoice price of the berries, and on \* \* \* for payment under its written guarantee, but failed to recover any amount from either respondent. On May 5, 1947, \* \* \* resold the berries to the \* \* \* for the net amount of \$4,509. Complainant's claim in this proceeding is for the total invoice price of the boysenberries and strawberries amounting to \$5,257.72, plus the total invoice price of the blackberries amounting to \$1,943.66, plus \$279.41 storage, less \$4,509 resale receipts, or the net amount of \$2,971.79.

14. Informal complaint was filed on April 29, 1947, which was within nine months after the accrual of the alleged cause of action.

### CONCLUSIONS

Respondent \* \* \* originally placed its order for the strawberries and boysenberries on July 31, 1946. At that time, this respondent had a contemplated need for the fruit in its manufacturing business and placed the order with the express understanding that the merchandise would be delivered promptly. \* \* \* testified that in the early part of September he complained to the broker because the berries had not been delivered; that on September 4, 1946, the broker advised that if \* \* \* would increase his order by 200 tins of frozen blackberries this would complete the pool car and shipment could be made immediately; and that he agreed to purchase the additional berries only because of the assurance as to time of shipment. Attached to the complaint is a copy of a telegram dated September 4, 1946, sent by \* \* \* addressed to \* \* \* which reads:

"RETEL SOLD \* \* \* 200 FIFTYS UNCULTIVATED BLACKBERRIES AT 20 THIS COMPLETES STOP OFF CAR REFERRED YOUR LETTER 26TH SHIP PROMPT TO ARRIVE MCKR TO DETROIT REFRIGERATING CO \* \* \* WILL PAY DRAFT AGAINST SHIPPING DOCUMENTS THIS AS WELL AS OTHER ORDER."

On the same day, the broker sent to \* \* \* a letter pertaining to the additional order which states, in part, "This should give you the necessary weight to make prompt shipment of this car" and "We trust you will find it possible to make prompt shipment of this merchandise."

The evidence establishes that the order of July 31, 1946, and the supplemental order of September 4, 1946, specified prompt shipment. Complainants do not dispute this fact. The question presented is whether the shipment was made promptly. There was a lapse of 70 days between the date the first order was placed by \* \* \*, and the date the merchandise was finally shipped. As to the second order, placed on September 4, 1946, with the express understanding that this would permit prompt shipment of the carload, there was a lapse of about 35 days before actual shipment. The period of time in the first instance was occasioned by reason of the fact that \* \* \* was unable to assemble sufficient orders to fill a pool car. \* \* \* testified that prompt shipment in connection with a pool car means in the trade whenever sufficient weight has been assembled. \* \* \* also contends that the length of time was due in part to the refusal of \* \* \* to pay the drafts which the shipper had issued against non-

negotiable warehouse receipts. \* \* \* testified that he did not agree to pay for the berries on this basis and that his purchases from other shippers on the West Coast were always sight drafts against bills of lading. With respect to the supplemental order of September 4, 1946, \* \* \* contends that shipping instructions could not be given until September 25, 1946, because the blackberries had to be packed and frozen, and actual shipment was not made until October 9, 1946, because it took that period for the Northwestern Ice Company to get the car loaded and shipped, there being a shortage of cars and an extremely large amount of produce being shipped. \* \* \* testified, in effect, that he was not informed by the broker on September 4, 1946, that the blackberries had to be packed and frozen, and that he understood the car would be shipped immediately.

It would be unreasonable to require a purchaser to wait for an indefinite period until a seller is successful in obtaining sufficient orders to fill a pool car before delivery is made, unless there is a definite understanding between the parties that such delay may be expected. In this case, however, the purchaser placed his order with the express understanding that it would be sufficient to complete the pool-car load, and that delivery would be made promptly. In spite of this agreement, there was an overall period of 70 days before the goods were finally shipped. Most of this delay resulted from the seller's inability to sell sufficient weight to fill the pool car. While \* \* \*, was willing to continue with its order on September 4, 1946, thereby waiving the prior delay, it was on the condition that the berries were then ready to be shipped and shipment would be made within a short period of time. As to the meaning of prompt shipment under the circumstances of this case, we need only turn to the telegram dated September 4, 1946, sent by \* \* \* to the broker, which states, "Retel Confirm \* \* \* Blackberries Now Packing. Shipment About Ten Days." Thus, it was expected that shipment would be made about September 15, 1946. It is concluded that the terms of the contract calling for prompt delivery were breached by complainants and, therefore, the cancellation of the contract by \* \* \* because of such breach was not without reasonable cause.

The claim against respondent \* \* \*, is based upon a guarantee made by this respondent to \* \* \* by telegram dated September 11, 1946, which reads as follows: "Rephone \* \* \* We Guarantee Payment \* \* \* Draft Against Shipping Papers." In the brief submitted on behalf of this respondent, it was contended that the Secretary is without jurisdiction to consider the complaint against \* \* \*, since it was neither the shipper nor the purchaser of the

commodities in question. There is no merit in this position. Section 2 of the act applies not only to sellers and purchasers, but also to brokers. Sub-paragraph (4) of Section 2 makes it unlawful for any broker subject to the act to fail, without reasonable cause, to perform any specification or duty, express or implied, arising out of any undertaking in connection with any interstate transaction involving any perishable agricultural commodity. The provision is sufficiently broad in its scope to include the guaranty transaction entered into by this respondent in connection with this interstate shipment of frozen fruit.

It is concluded that the Secretary has jurisdiction to consider the complaint made against \* \* \*, therefore, the matter must be considered on its merits. In order to cause \* \* \* to ship the strawberries and boysenberries on the basis of draft against shipping papers, rather than draft against warehouse receipts, \* \* \*, guaranteed the payment of the drafts by \* \* \*. This is a guaranty contract, which, if it is enforceable, must be collateral to and dependent upon a primary enforceable contract. As concluded above, the primary contract between the complainants and \* \* \*, is not enforceable because of a breach of contract on the part of the complainants. Accordingly, the collateral guaranty contract also is unenforceable. It is an established rule of law that if the creditor has no cause of action against the principal debtor, there can be no obligation on the part of the guarantor to pay; in other words, liability of a guarantor can arise only in the event that breach of duty owed by the principal debtor to the creditor is shown.

It is concluded that the complaint should be dismissed as to both respondents.

#### ORDER

The complaint is dismissed.

Copies of this order shall be served upon the parties.

(No. 2339)

PACA Doc. No. 5123.\* Decided January 31, 1950.

#### Dismissal—Suitable Shipping Condition

Where complainant contracted to sell to respondent a carload of grade U. S. No. 1, Size A, potatoes f. o. b. Nyssa, Oregon, and the potatoes were certified as such grade at shipping point, but, at destination they were found to be abnormally deteriorated, held, that the potatoes were not in suitable

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\*As explained in Prefatory Note, the identities of the parties are not disclosed.—Ed.

shipping condition, that the respondent made prompt and proper resale of the potatoes, and remitted the net proceeds to complainant, and that the complaint should be dismissed.\*\*

*Mr. Henry T. Spiegel, of Manitowoc, Wisconsin, for complainant. Wesco Foods Company, of Chicago, Illinois, respondent pro se. Mr. E. D. Mulville, Presiding Officer.*

*Decision by Thomas J. Flavin, Judicial Officer*

#### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). On November 15, 1948, an informal complaint was filed by \* \* \* against \* \* \*. \* \* \* assigned its claim against respondent to \* \* \* on January 18, 1949. A formal complaint was filed by \* \* \* on March 10, 1949, alleging that on August 2, 1948, \* \* \* sold to respondent a carload of potatoes for a total price of \$828 and on the basis "inspected, selected and accepted track f. o. b. Nyssa, Oregon, to be shipped to respondent's connection, \* \* \*." It is alleged further that respondent paid \$440.94, but has failed and refused to pay the balance due of \$387.06. A copy of the report of investigation was served upon complainant on April 7, 1949, by registered mail. On the same date a copy of the report of investigation and a copy of the formal complaint were served upon respondent by registered mail.

An answer to the complaint was filed by respondent on May 5, 1949, an extension of time having been granted for that purpose. Respondent denies that the terms of the contract were as set forth in the complaint and alleges instead that the contract of sale specified grade U. S. No. 1, Size A, potatoes. Respondent alleges further that upon arrival at Memphis the potatoes were in a deteriorated condition, indicating that they could not have been in suitable shipping condition when shipped; and that respondent handled the potatoes to best advantage for the account of whom it may concern.

Since the amount claimed does not exceed \$500, the proceeding is disposed of under the shortened method of procedure provided for by section 47.20 of the amended rules of practice (7 CFR 47.20). The complainant filed an opening statement of facts, respondent filed an answering statement of facts, and complainant filed a statement in reply.

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\*\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.



### FINDINGS OF FACT

1. Complainant is a corporation, \* \* \*, whose post office address is Nampa, Idaho.

2. Respondent is a corporation, \* \* \*, whose post office address is \* \* \*. At the time of the transaction involved in this proceeding, respondent was licensed under the act.

3. On or about August 2, 1948, in the course of interstate commerce, \* \* \*, entered into a contract to sell to respondent a carload of grade U. S. No. 1, Size A, potatoes at the agreed price of \$828, f. o. b. Nyssa, Oregon. Respondent requested that the potatoes be shipped to \* \* \*.

4. On or about August 2, 1948, pursuant to said contract, car PFE 25259, containing potatoes which has been officially inspected and certified as grading U. S. No. 1, Size A, was shipped from Nyssa, Oregon, to \* \* \*.

5. The shipment arrived in Memphis, Tennessee, on August 8, 1948, and a Federal inspection was made at 9:00 a. m. on August 9, 1948. The quality and condition of the potatoes was certified as follows:

"In 30% of samples from 3 to 4%, in 70% from 5 to 10%, average 6% Soft Rot. Slimy Soft Rot in all stages, mostly advanced. In most samples from 2 to 5%, in many none, average 2% of stock damaged by slightly sunken discolored sticky areas. Remainder of stock generally firm."

6. \* \* \* rejected the shipment to respondent. On August 9, 1948, respondent notified \* \* \* of the quality and condition of the potatoes as revealed by the inspection certificate and requested an adjustment. The parties failed to adjust the matter amicably, whereupon respondent on or about August 10, 1948, sold the potatoes to \* \* \* for \$990, less freight of \$549.06, or a net price of \$440.96.

7. Respondent remitted the net proceeds of \$440.94 to the seller. The check was accepted under protest and not as satisfaction of the seller's claim under the contract.

8. \* \* \* assigned its claims and right of action against respondent under the contract to \* \* \* on January 18, 1949.

9. Formal complaint was filed March 10, 1949, which was within nine months after the alleged cause of action accrued.

### CONCLUSIONS

In this proceeding complainant contends that the potatoes involved were purchased by respondent after inspection by \* \* \*, respondent's buying agent. In support of this contention complainant submitted the affidavits of \* \* \*, complainant's president, and \* \* \*, the foreman of complainant's packing plant at Nyssa.

Respondent maintains that its agent did not inspect the particular carload of potatoes shipped, and that, to the contrary, its agent contracted for the purchase of a carload of potatoes grading U. S. No. 1, Size A. The evidence of record includes the affidavit of \* \* \*, which reads in part as follows:

"As an employee of \* \* \*, I, \* \* \*, on August 2, 1948, visited the packing plant of \* \* \* and there saw potatoes in the process of washing, grading, packing, and shipping.

"Being favorably impressed with the general quality and condition of said potatoes then running, I engaged to buy one car load of such of them as would by government inspection grade U. S. No. 1, Size A, to be packed in One Hundred Pound net weight bags, said load to be forwarded to \* \* \*.

"After visiting the aforementioned plant, I was informed that the shipper, \* \* \*, would load the potatoes for Memphis into P. F. E. car numbered 25259 which car itself or the load placed therein had not been inspected by me."

The record also contains a copy of the invoice sent by the seller to respondent on August 5, 1948, the terms therein being "Bliss Triumph Potatoes, U. S. 1, Parade Brand." In addition, there is a document of record entitled "Confirmation of Purchase," signed by \* \* \*, a copy of which was forwarded to the seller. The terms set forth therein are "Usone, Size A, Washed Triumphs."

The mere fact that \* \* \* inspected some of the potatoes, or had an opportunity for inspection of some or all of them, does not necessarily make the transaction a purchase after inspection with no warranties. On the other hand, the fact that the seller issued an invoice containing a statement as to grade does not necessarily mean that the transaction was a sale by description. The conflicting contentions and evidence leave some room for doubt as to the exact nature of the contract. From a careful consideration of all the evidence submitted on the point, it is concluded that the contract was for a carload of grade U. S. No. 1, Size A, potatoes, in other words, it was a sale by description on an f. o. b. basis; and that the contract was not on the basis of a purchase after inspection to which the rule of *caveat emptor* would apply.

The term "f. o. b.," as defined by section 46.24 (i) of the regulations under the act, "means that the produce \* \* \* sold is to be placed free on board the \* \* \* car \* \* \* at shipping point, in suitable shipping condition, and that the buyer assumes all risk of damage and delay in transit not caused by the shipper \* \* \*." Section 46.24 (j) defines "suitable shipping condition" in relation to direct shipments as meaning "that the commodity, at the time of billing, is in condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the destination specified in the contract of sale."

Thus it appears that the seller, under the contract in this case, warranted that the potatoes were in suitable shipping condition on August 2, 1948, the date of shipment; that is, that they were in a condition which, if the shipment was handled under normal transportation service and conditions, would assure delivery without abnormal deterioration at Memphis, Tennessee. At the time of shipment the potatoes were certified as grade U. S. No. 1, Size A, with  $\frac{1}{2}$  of 1 percent Soft Rot. The U. S. Standards for Potatoes, effective June 5, 1947, allow a total tolerance of not more than 1 percent for Soft Rot or wet breakdown in the U. S. No. 1 grade. Inspection at destination disclosed an average of 6 percent Soft Rot and Slimy Soft Rot, and 2 percent affected with slightly sunken, discolored, and sticky areas. In our opinion, the amount of deterioration was abnormal for potatoes purchased as grade U. S. No. 1 at shipping point.

With respect to the suitable shipping condition warranty, complainant contends that the shipment was not handled in a normal manner in that there was a two-day delay in transit and the ice in the bunkers was approximately three feet from the top of the car at the time of the destination inspection. The record contains a letter from the railroad stating that the carload of potatoes should have arrived in Memphis on August 7 rather than on August 8, or a delay of one day. The destination inspection certificate states that the "ice in bunkers approximately 3 feet from top." But, with respect to the temperature of the product, the certificate also shows that the temperature was 47° F. at the door and 43° F. at the bottom of the car. The evidence leads us to conclude that the refrigeration service was proper. Despite the carrier's statement that the car was due for delivery one day earlier, it has not been established that travel time was abnormal. But even if the record would support a conclusion that travel time was one day in excess of normal, it would make no difference in the rights and liabilities of the parties. A one day delay would not, in our opinion, account for the excessive deterioration disclosed by the destination inspection, and it seems perfectly clear to us that on the day prior to arrival the potatoes were in an abnormally deteriorated condition. We conclude, therefore, that the potatoes were not in suitable shipping condition when shipped. Failure of the shipper to deliver potatoes that were in suitable shipping condition was a breach of the contract and a violation of section 2 of the act.

Respondent's answering statement sets forth that it resold the potatoes for the best price obtainable to a dealer in Memphis who was equipped to recondition them. It appears that resale was promptly and properly made so that the price received was indicative of the market value of the potatoes on or about the time of the arrival. The

difference between the total cost of the potatoes to respondent and the gross proceeds of resale, or \$387.06, represents the damage sustained by respondent. The purchase price of \$828, less the respondent's damages of \$387.06, leaves a balance of \$440.94. Since respondent has already remitted the latter amount to the seller, there is no further amount due complainant and the complaint should be dismissed.

#### ORDER

The complaint is hereby dismissed.

Copies hereof shall be served upon the parties.

(No. 2340)

PACA Doc. No. 5253.\* Decided January 31, 1950.

#### Dismissal—Settlement Between Parties

The Department having received a letter dated January 25, 1950, from complainant's attorney, to the effect that the claim for reparation has been settled between the parties and that dismissal is requested, the complaint is accordingly dismissed.

*Mr. Max W. Soffer*, of St. Louis, Missouri, for complainant. *Mr. Sidney R. Zall*, of Philadelphia, Pennsylvania, for respondent. *Mr. Webster P. Maxson*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

#### ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). An informal complaint was received September 2, 1949. Formal complaint was filed December 5, 1949, alleging that complainant sold to respondent on or about May 11, 1949, a carload of onions shipped from Laredo, Texas, May 6, containing 510 sacks at \$1.75 per sack, or \$892.50, f. o. b., Laredo; that the carload was rejected by respondent upon arrival at Philadelphia, Pennsylvania; that resale resulted in net proceeds of \$42.11; and that complainant is entitled to damages in the amount of \$850.39, the difference between the contract price and the net proceeds on resale. Respondent filed its answer on December 30, 1949, and requested an oral hearing.

By letter dated January 25, 1950, complainant's attorney notified the Department that the parties had made an amicable settlement of the dispute and authorized dismissal of the complaint. Accordingly, the complaint filed herein is dismissed.

•Copies hereof shall be served upon the parties.

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\*As explained in Prefatory Note, the identities of the parties are not disclosed.—Ed.

## **COURT DECISIONS**

**DAIRYMEN'S LEAGUE COOPERATIVE ASS'N, INC. v. BRANNAN, SECRETARY OF AGRICULTURE,**† 173 F. 2d 57. Decided February 1, 1949.

### **UNITED STATES COURT OF APPEALS, SECOND CIRCUIT**

**No. 36, Docket 21009**

#### **Classification of Milk—Class II—A**

Where cream from milk which was separated at the seller's "country plants" was shipped to an unapproved plant in Jersey County and there the cream was picked up at the railway platform by the purchaser's affiliate and delivered to the affiliate's approved plant in New Jersey, it is held, that the milk was properly classified at the country plants as II-A for purposes of producer-settlement fund.\*

#### **Status of Handler Determined by Location of Approved Plant**

Where a purchaser receives cream in an unapproved plant, and takes it at once to an approved plant, such purchaser's status as a handler of milk is to be determined by the location of the approved plant.\*

#### **Element of III-D Classification of Milk**

Delivery of cream from an approved plant of a purchaser's affiliate to other plants of the affiliate, whether in "approved" or "unapproved" counties does not constitute delivery to a "purchaser," not a handler, outside of New York and outside "approved county", a necessary element of III-D classification.\*

#### **Classification of Milk—Inapplicability of III-D Classification**

III-D classification does not cover a delivery of cream to a subdealer as purchaser in an approved county.\*

#### **"Purchased"—Inapplicability of Term Used in Regulation**

In interpreting the regulation relative to milk "delivered as cream to a purchaser", the general definition of "purchased" as meaning "acquired for marketing" is inapplicable.\*

#### **Construction of Phrase "Not a Handler"**

The phrase "not a handler" must be construed as not a "handler anywhere" rather than a mere redundant interpretation that would add nothing to the

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†5 A. D. 143, affirmed.—Ed

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

regulation defining the word "handler" as one handling milk or cream received at an approved plant.\*

### **"Handler," Meaning of Phrase—Delivery of Cream to Handler**

Delivery of cream to an unapproved plant constitutes a delivery to a "handler" under the regulation defining the word "handler" as one handling milk or cream received at an approved plant.\*

### **Divisions of Corporations Found Not Separate Jural Persons**

In absence of anything to the contrary in record, the court assumed that "divisions" of corporations did not represent separate jural persons, but only a convenient distribution of operative management.\*

### **Inapplicability of Milk Market Administrator's Interpretation of Regulation Relative to Manufacturing Plant as Distinguished From Distributing Plant**

Milk Market Administrator's interpretation of regulation for classification of milk that "when milk is delivered from a strictly fluid receiving station to a separating station, and from there on to a manufacturing plant, the manufacturing plant . . . is the second plant where the product moved as cream is inapplicable to a plant used for distributing, not manufacturing".\*

### **Classification of Milk—Milk Not Subject to III-D Classification**

Milk which was delivered successively to three cream plants operated by the same corporation is not considered delivered to a "purchaser" at either first or second plant, and, therefore, is not subject to III-D classification.\*

### **Courts—Review by Court of Erroneous Stipulation**

Reviewing court would not hold defendant to stipulation indicating, contrary to court's opinion, that operator of particular plant was not a "handler" within milk regulation, nor send the case back for further hearing, where stipulation did not mislead plaintiff, and the latter did not ask leave to prove any additional facts.\*

### **Courts—Complaint of Action of Judicial Officer Not Considered by Court**

Plaintiff's complaint that Judicial Officer did not give leave to file brief on particular point covered by stipulation would not be considered where an opportunity for argument was afforded in the district and reviewing court.\*

### **Judicial Officer's Refusal To Accept Stipulation as Final Approved by Court**

Judicial Officer properly refused to accept as final a stipulation attempting to put a gloss upon milk regulation which had the force of law.\*

### **Courts—Duty of Court Relative to Existing Rights and Obligations**

It is the duty of courts to administer rights and obligations as they exist, not as parties may choose to substitute others.\*

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions—Ed

**Repudiation of Agreed Interpretation of Regulation Approved by Court**

Where a fair opportunity is given to meet any change of front which arises out of the repudiation of the agreed interpretation, the party who suffers from it has no ground for complaint, and this doctrine is especially reasonable when, as here, the repudiation is by a succeeding official who differs with his predecessor.\*

**Administrative Law—Usage in Reliance on Administrative Interpretation—Estoppel**

Where plaintiff asserted in its brief that it relied upon the memorandum of December, 1938, which defined "not a handler", and that because of it, it conducted its business as it would not otherwise have done, and called this an estoppel, the court held, that, while it is true that in cases of doubtful interpretation, long usage in reliance upon an administrative interpretation often counts for much, the court need not say how far the court should feel bound by the interpretation if the plaintiff had proved that it did conduct its business in reliance upon the memorandum, and the court cannot accept as an equivalent the bare assertion in the brief of such reliance, and would not remand the case to try out such issue.\*

**Administrative Law—Choice of Reasonable Construction of Regulation**

Where alternative interpretations are possible, the more reasonable of the two is to be chosen.\*

**Administrative Law—Test of Reasonable Construction of Regulation**

The intent of draughtsmen of regulations is a past fact not determinable by future events and evidence that the regulation did not operate as it was designed to do and as construed was unreasonable, is inadmissible, as purpose and realization are totally different things.\*

**Administrative Law—Judicial Review of Validity of Regulation**

Where evidence on which administrative regulation was based was not before reviewing court, the reviewing court would not decide whether the regulation was invalid if construed as the court deemed proper.\*

**Administrative Law—Reopening of Proceeding**

The reviewing court would not reopen the administrative proceeding and require long consideration of issues, many of which were superseded by an amendment of the regulation, on the ground that the regulation was invalid as construed, where plaintiff had preferred not to try out that question when that course was open.\*

**Administrative Law—Wayward and Vacillating Administration of Regulation, Affecting Third Parties**

Plaintiff could not become the vicarious champion in its own interest of imperfections in discharge of duties of the Secretary of Agriculture on the

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

ground that the administration of a regulation was wayward and vacillating, as affecting third parties.\*

**Characterization by Court of Difficulties Involved in Administration of Milk Orders—"Multifarious Ramifications"—"Supernatural Powers"—"Stunned and Confounded by Fantastic Proliferation"—"Verbal Mazes"**

"We are indeed aware how great an advantage familiarity with the multifarious ramifications of such a subject as milk regulation gives to administrators, and how much less favored are we who must plunge into it unequipped. Nevertheless, we should have to endow them with almost supernatural powers, if they were not, like ourselves, at the outset stunned and confounded by the fantastic proliferation which emerges, when one attempts to find a path through such verbal mazes".\*

[59†] Appeal from the United States District Court for the Northern District of New York.

Action by Dairymen's League Cooperative Association, Inc., against Charles F. Brannan, Secretary of Agriculture, under Agricultural Adjustment Act, § 8c (15) (A), 7 U. S. C. A. § 608c (15) (A), to review an [60†] order of the Secretary of Agriculture which denied for the most part a petition of plaintiff for refund of sums paid under protest upon demand of the Market Administrator. From a judgment dismissing the complaint, plaintiff appeals.

*Affirmed.*

*Seward A. Miller*, of New York City, (*Frederic P. Lee*, of Washington, D. C., and *Frank B. Lent*, of New York City, of counsel), for appellant.

*Neil Brooks*, Sp. Asst. to Atty. Gen. (*J. Stephen Doyle, Jr.*, Sp. Asst. to Atty. Gen., *Lewis A. Sigler*, Asst. Assoc. Sol., U. S. Dept. of Agriculture, of Washington, D. C., and *Irving J. Higbee*, U. S. Atty., and *Edmund Port*, Asst. U. S. Atty., both of Syracuse, N. Y., on the brief), for appellee.

Before L. HAND, Chief Judge, and SWAN and CHASE,  
Circuit Judges

L. HAND, *Chief Judge*:

The Dairymen's League appeals from a judgment which dismissed its complaint in an action to review an order of the Secretary of Agriculture, which had for the most part denied its petition filed under § 8c (15) (A) of the Act, 7 U. S. C. A. § 608c (15) (A), for a refund of sums paid to the "producer-settlement fund."<sup>1</sup> The petition was referred to a "judicial officer," who held a hearing and on March 8, 1946, made an extensive and detailed report which has been published.<sup>2</sup> The findings of fact incorporated into the report are too voluminous and detailed to be repeated here; and, since our decision will be primarily of interest to those who are concerned with the administration of milk regulation in the Metropolitan Marketing

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

† Italic figures in brackets refer to first word beginning a page in 173 F. 2d.—Ed.

<sup>1</sup> § 927.8 (g) of the Code of Federal Regulations, 1938 Supplement.

<sup>2</sup> 5 Decisions of the Secretary of Agriculture 143.



Area,<sup>3</sup> we may proceed in our discussion upon the assumption of an acquaintance with the findings. The defendant's brief contains at its end a graphic chart of the plaintiff's four claims, which in small compass makes clear the controlling facts, and this we append hereto: it will, we believe, make intelligible what we have to say, or at least serve as a skeleton to which such facts as are necessary may be added.

During the two periods in question (October 1, 1938, to February 1, 1939, and July 1, 1939, to April 30, 1940) the plaintiff had two plants, one at Horseheads, New York, the other at Mansfield, Pennsylvania, which we shall speak of as its "country plants." Both were outside the "marketing area," which comprised only the City of New York and the Counties of Westchester, Nassau and Suffolk. To these plants "producers"—farmers—delivered part of the milk which is in question in Claims One and Two; the rest of this milk was delivered to the "country plants" by "feeder" plants which had received it from other "producers." Nearly all the milk in question in Claims Three and Four was delivered to the Borden Company by "producers," who were members of the plaintiff, or by the plaintiff's "feeders." The case turns upon how all this milk should be "classified" under the Regulation, of which we set out in the margin those parts that are controlling.<sup>4</sup>

<sup>3</sup> Part 927, Chapter IX, Title 7, Code of Federal Regulations, 1938 Supplement.

<sup>4</sup> 927.2 (f) of the Code of Federal Regulations, 1938 Supplement.

"Handler" means any person who engages in the handling of milk, or cream therefrom, which was received at a plant approved by any health authority for the receiving of milk to be sold in the marketing area, which handling is in the current of interstate commerce or directly burdens, obstructs, or affects interstate commerce. This definition shall be deemed to include a cooperative association of producers with respect to any milk received from producers at any plant operated by such association or with respect to any milk which it causes to be delivered from producers to any other handler for the account of such association and for which such association collects payment. This definition shall not be deemed to include any person who neither receives milk from producers nor handles milk which is sold as milk or cream in the marketing area."

§ 927.4 of the Code of Federal Regulations, 1938 Supplement.

"Classification of milk—(a) *Basis of Classification.* All milk received from producers by handlers shall be classified in the classes set forth in paragraph (b) of this section in accordance with its utilization at, or movement from, the plant where received from producers, including members of any cooperative association: *Provided*, That if milk is moved as milk from any plant outside the marketing area where received from producers to a second plant outside the marketing area, classification of such milk at the first plant may be in accordance with its utilization at such second plant: *And provided further*, That if milk is moved as cream, plain condensed milk or homogenized mixtures from any plant outside the marketing area to any second plant classification of such milk at the first plant may be in accordance with its utilization at such second plant.

"(b) *Classes of utilization.* The classes of utilization of milk shall be as follows:

"(1) Class I milk shall be all milk which leaves a plant as milk, chocolate milk, or any whole milk drink, and all milk the utilization of which is not established for classification in some other class named in this section, except that loss or waste of milk in the plant where received from producers, not to exceed 2 percent of the total quantity of milk received from producers, may be pro-rated to each class in the proportion which the milk in such class is of the total quantity of milk classified.

## [61†] Claim One

The milk in question in Claim One, having been received either at Horseheads or Mansfield from "producers" or "feeders," was there turned into cream, and all sold, F. O. B. Newark, New Jersey, to the Philadelphia Dairy Products Company. That company had an "affiliate," called the Janssen Dairy Corporation, which had a "plant" in Hoboken. Newark was not in an "approved county"; but Hoboken was—Hudson County. The cream, though billed to, and paid for by, the Philadelphia Company, was "picked up" at the railway platform at Newark by the Janssen Company, and was taken by trucks to the Janssen Company's Hoboken plant, whence all of it went to three of that company's other buildings, except such part as was sold to one, Decker, in Hudson County. One of the three buildings was in Bergen County—"unapproved"; the other two were in Hudson County.

The question is whether this cream was properly classified under subdivision (b) of § 927.4 as II-A, or should have been classified as III-D. The defendant argues, and the "judicial officer" found, that III-D (except for the concluding clause covering "cream cheese") was limited to cream sold from the first of the two plants covered by the second proviso of subdivision (a). The argument is that, since the body of subdivision (a) makes classification depend upon "utilization at" the first "plant," or "movement from" it, in contrast with both provisos which make "utilization at" the second "plant" the only basis of classification, some distinction must be presupposed, and classifica-

"(2) Class II-A milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of cream, except as set forth in subparagraphs (5) and (7) of this paragraph

"(3) Class II-B milk shall be all milk the butterfat from which leaves, or is on hand at, a plant in the form of plain condensed milk, except as set forth in subparagraph (6) of this paragraph, frozen desserts, and homogenized mixtures

"(4) Class III A milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of evaporated milk in hermetically-sealed cans, sweetened condensed milk, milk chocolate, milk powder, malted milk powder, or any cheese other than American Cheddar and cream cheese.

"(5) Class III-B milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of cream which is subsequently held in a licensed cold storage warehouse for more than seven days at a temperature below zero degrees Fahrenheit.

"(6) Class III C milk shall be all milk the butterfat from which leaves a plant in the form of frozen desserts or homogenized mixtures which were sold outside of New York City.

"(7) Class III D milk shall be all milk the butterfat from which is delivered as cream to a purchaser, not a handler, outside the State of New York and outside any county in other States in which there is a plant which is approved by any health authority for the receiving of milk to be sold in the marketing area, also milk the butterfat from which leaves or is on hand at a plant in the form of cream cheese

"(8) Class IV-A milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of butter.

"(9) Class IV-B milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of American Cheddar cheese."

† Italic figures in brackets refer to first word beginning a page in 173 F. 2d.—Ed.

tion at the second "plant" can never depend upon the milk's "movement from" it. There is much to be said for this; but the difficulty is that subdivision (b), which defines "classes of utilization," speaks throughout (except in the first [62†] phrase of III-D itself) of the form in which the produce "leaves" a "plant"; and, therefore, incorporates the factor of "movement from" a "plant." The question is a vexed one and we shall leave it undecided, accepting the plaintiff's argument, for the purposes of this appeal, that it had an option of classifying the cream at either the first or the second "plant."

Coming then to the cream in Claim One, we shall first consider its proper classification at the two "country plants." Concededly, it was within II-A, unless it could be brought within III-D: that is, unless it was delivered to a "purchaser" who was "not a handler." We shall start by assuming with the plaintiff that the milk which the "feeders" delivered to the two "country plants" is to be classified like that delivered by "producers"—that is, that the "feeders" shall not count as a first "plant." The record leaves uncertain just what was the relation between the Philadelphia Company and the Janssen Company; all it says is that the second corporation was an "affiliate," which may mean that the corporations should be treated as a single jural person, or as two. We shall consider Claim One on both hypotheses.

[1, 2] If we treat the corporations as several, the cream was never "delivered" to the Philadelphia Company at all; the Janssen Company took it directly from the platform of the carrier, a bailee, and carried it by truck to the Hoboken "plant." The plaintiff does not suggest that the Philadelphia Company was not the "purchaser," and it necessarily follows that upon this hypothesis III-D was not available at the two "country plants." If on the other hand, we treat the Philadelphia Company and the Janssen Company as one, when the Janssen Company "picked up" the cream from the carrier's platform in Newark, although the delivery was to the "purchaser," the Philadelphia company was also a "handler," by virtue of the ownership by the Janssen Company of that company's Hoboken "plant," which was in an "approved county." This is quite another question than whether a person who has a "plant" in an "approved county" and another "plant" in an "unapproved county" is to be regarded as a "handler" as to milk which he receives in the "unapproved county." All we need hold as to Claim One is that (when a "purchaser" receives cream in an "unapproved county" and takes it at once to a "plant" in an "approved county," his status as "handler" of that milk is to be determined by the location of that "plant.")

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† Italic figures in brackets refer to first word beginning a page in 173 F. 2d.—Ed.

[3, 4] What we have said disposes of the classification of the cream at the two "country plants"; it remains to consider its classification at the Janssen Company's Hoboken "plant." So much of the cream as was delivered from the Hoboken "plant" to other "plants" of the Janssen Company whether in Hudson County—an "approved county"—or in Bergen County—an "unapproved"—was not delivered to a "purchaser." We will state the justification for this conclusion in our discussion of Claim Two, where the question also arises. The only "purchaser" from the Hoboken "plant" was Decker, who was a "sub-dealer" in Hoboken; but since the "delivery" was in an "approved county," III-D did not cover it. Claim One was properly dismissed.

### Claim Two

The milk involved in this claim was also delivered by "producers" and "feeders" to the plaintiff's two "country plants" where it was made into cream. From the two "country plants" it went to a plant of the plaintiff in Newark in an "unapproved county," whence part of it was sold to the Janssen Company, and was taken to one of its "plants" in Bergen County, an "unapproved county." The remainder was sold to dealers or "sub-dealers," who did their business, so far as appears, in "approved counties." Some of this cream was sold at the "plant" in Newark, some was shipped by express collect, and some was delivered "on route" by the plaintiff's trucks.

[5-7] The plaintiff first argues that its delivery to its Newark "plant" was a purchase, for which it relies upon a remark of Reed, J., in *United States v. Rock Royal Co-Operative, Inc.*<sup>5</sup> that "purchased" means "acquired for marketing." That was said in discussing sales of milk by "producers" to their cooperative, as to which the Act was explicit; it was not intended as a general [63†] definition, and to use it in interpreting III-D would unduly expand the court's meaning. Class III-D was probably put into the Regulation because it was supposed that cream actually bought by someone outside an "approved county" was unlikely to find its way into the "marketing area." Since the first "plant" was the two "country plants" and there was no sale from them, we need consider only the proper classification at the plaintiff's Newark "plant." As to the cream sold to the Janssen Company and taken by it to its own "plant" in Bergen County, since the company was a "purchaser" and the delivery was in an "unapproved county," the question whether the cream was within III-D depends upon whether the "purchaser" was a "handler." That, in

<sup>5</sup> 307 U. S. 533, 59 S. Ct. 993, 1016, 83 L. Ed. 1446.

†Italic figures in brackets refer to first word beginning a page in 173 F. 2d.—Ed.

turn, depends upon whether its ownership of the Hoboken "plant" in an "approved county" made it a "handler" as to cream delivered at its "plant" in the "unapproved county," or whether its character as "handler" should be determined by the location of the "plant" at which the cream was "delivered." The defendant argues that unless the phrase, "not a handler," in III-D means, "not a handler anywhere," it is a redundant interpolation, which we should not assume. His reason for this is that by definition<sup>6</sup> a "handler" is one who handles milk or cream "which was received at a plant approved by any health authority for the receiving of milk to be sold in the marketing area"; and that a person who handles milk or cream, only at a "plant" in an "unapproved county," would not come within that definition, even without the addition of the phrase, "not a handler." Hence, to give the phrase any significance whatever, it must mean that the "purchaser" is not a "handler" elsewhere; which results in saying that he must not have a "plant" in any "approved county." To this the plaintiff answers that, if the phrase, "not a handler," were left out, a New York City dealer might bring himself within III-D by buying cream in an "unapproved county" and taking it to sell in New York; and that it was necessary to provide that he must not himself be a handler to prevent this. However, we cannot believe that, if III-D had not contained the phrase, it would have been susceptible to such easy evasion as this argument presupposes. It would be true that "delivery" would in that case have been made in an "unapproved county," if by "delivery" no more was intended than the transfer of possession to the "purchaser"; but that, we submit, is not a tenable reading. We have already so decided in discussing Claim One as to the delivery of cream to the Janssen Company on the railroad platform at Newark, which it carried by truck to its Hoboken "plant." In the plaintiff's example of the New York City dealer the applicability of III-D (if the phrase were left out) would depend upon whether the "purchaser" took delivery at the seller's "plant," or the seller delivered at the "purchaser's" "plant"; and to make that circumstance determinative would introduce a factor altogether alien to the general purposes of the Act. Since the Janssen Company had a "plant" in an "approved county," the cream delivered to it at its Bergen County "plant" was delivered to a "handler," and was not within III-D.

[8] The cream sold to the dealers and sub-dealers from the Newark "plant" was in part delivered to them in Newark and in part "on routes" or by express. The only remaining question as to these is whether they were "handlers"; but in view of what we have said as to

<sup>6</sup> § 927.2 (f).

"delivery" this is not important. So far as appears, all had their place of business in "an approved county," and the "delivery" was in that county, regardless of whether they took possession at the plaintiff's platform in Newark, or received the cream where they did business. Claim Two was properly dismissed.

### Claims Three and Four

These claims we shall break into Claim "A" and Claim "B" and "C," since that is a more convenient division. Claim "A" was for milk delivered by "producers" or "feeders" to four "plants" of the Borden Company, and to two small "plants" of the plaintiff. That delivered to the first Borden "plant"—the Belmont "plant"—was there made into cream and delivered to a second Borden "plant" at Newark; that delivered to the other three Borden "plants"—Brisben, Pine Bush and Deposit—and to the [64†] two small "plants" of the plaintiff, was delivered as milk to the Borden "plant" at Newark, where some of it was made into cream and mixed with that which had come as cream to the Newark "plant" from the Belmont "plant." What remained of this milk does not concern us. All the cream, both that made at Newark and that delivered there as cream, was then shipped to the Borden "plant" at Paterson in an "approved county," whence it was sold in ways not material.

[9] The Belmont "plant" was operated by the Borden's Manufacturing Products Division of the Borden Company, and until October 1, 1939, the other "plants" were operated by the Borden Farm Products Division of that company. We assume, since there is nothing to the contrary in the record, that these "Divisions" did not represent separate jural persons, but only a convenient distribution of operative management. From October 1, 1939 forward, all the Borden "plants" here involved, except the Belmont, were operated by a new corporation then organized—Borden Farm Products of New Jersey, Inc. Whether these "plants" were transferred to the new company and what was the relation between it and the main Borden Company, is not clear; we shall assume for argument that it was an independent corporation, and that after October 1, 1939, the cream which passed from the Belmont "plant" to the Newark "plant" was sold.

[10–13] We take first the milk which came to the Belmont "plant" and which was there made into cream and delivered as such to the Newark "plant." At the Belmont "plant" it was properly classified as II–A unless it was within III–D. Until October 1, 1939, it could not have been classified as III–D, because the Newark "plant" was not

†Italic figures in brackets refer to first word beginning a page in 173 F. 2d.—Ed.

a "purchaser," for reasons which we have already given in discussing Claim Two. After October 1, 1939, even though we consider the transfer as delivery to a purchaser, the cream was nevertheless not within III-D because the Borden Company which owned the Newark "plant," was a "handler" by virtue of its ownership of other "plants." Nor could the cream be otherwise classified at the Newark "plant" itself, because the "delivery" was not to a "purchaser," and because it would have been to a "handler," if the Paterson "plant" had been a "purchaser." Taking next the milk which came to the Brisben, Pine Bush and Deposit "plants," it could not properly be classified otherwise than as I-A at those "plants," for it left them as milk, and only cream comes within III-D. Nor could it be classified as III-D at the Newark Borden "plant," because, although it was there made into cream, it was not delivered to a "purchaser," and if it had been, the "purchaser" was a "handler." Finally, taking the milk delivered to the plaintiff's small "plants," it could properly be classified only as I-A at those plants, because, although delivered to a "purchaser," it was not in the form of cream. At the Newark "plant," though made into cream, it could not be classified as III-D for the reasons already given in the case of the other cream delivered to the Paterson "plant."

[14] The plaintiff invokes a "memorandum" of Harmon, the Administrator at the time, made on December 8, 1938, which declared that "when milk is diverted from a strictly fluid receiving station to a separating station, and from there on to a manufacturing plant, the manufacturing plant \* \* \* is the second plant where the product moved as cream." Assuming this to be a proper interpretation, it does not apply here, because the Paterson "plant" was not a "manufacturing plant," but only a distributing plant. Part "A" of Claims Three and Four was, therefore, properly dismissed.

[15] Parts "B" and "C" of Claims Three and Four concerned milk, all of which was delivered after October 1, 1939, by "producers" or "feeders" to a Borden "plant" at Oxford, there made into cream and transferred to another Borden "plant" at Washingtonville in an "approved county." Thence it was transferred to four other Borden "plants," three of which were in "unapproved counties," and one in an "approved county." If we reckon the Oxford "plant" as the first, the cream as it left for the Washingtonville "plant" did not go to a "purchaser": hence it was not within III-D. If classified at the Washingtonville "plant," it was not within III-D because it was not delivered to a "purchaser." Parts [65†] "B" and "C" of Claims Three and Four were also properly dismissed.

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† Italic figures in brackets refer to first word beginning a page in 173 F. 2d.—Ed.

## Miscellaneous Questions

[16-20] The plaintiff makes several arguments which it thinks militate against the interpretations which we have adopted. The first is that the cause went to trial upon a stipulation which contained the following passages. "The delivery of cream shipped to such plant was not a receipt or purchase by a handler." This language was used of the plaintiff's Newark "plant" in Claim Two. The other passage is: "the operator with respect to such a plant is not a handler, and cream shipped to such a plant would be in the first instance delivered to a purchaser in an unapproved county who was not a handler with respect to such plant." This language was used of the plaintiff Borden's Newark "plant," in Part "A" of Claims Three and Four. If the plaintiff had been misled in presenting any evidence in reliance upon this stipulation, we might feel obliged either to send the case back for further hearing, or perhaps even hold the defendant to the stipulations; but it does not ask leave to prove any other facts than those on which the cause was heard; nor could it have been misled in the conduct of its business, because the stipulation was signed long after all the transactions here in question. Apparently, the conclusiveness of this agreed definition of the word, "handler," was first questioned by the "judicial officer" at a hearing on July 20, 1945. He at that time "warned" both parties that he might not feel bound by "legal conclusions as to whether a person is a handler." A discussion followed, but all that we can find is a request by the plaintiff to be allowed "to submit briefs on that point," if the "judicial officer" decided not to accept the stipulation. Although the plaintiff complains that no leave was ever given to file such a brief, we cannot see, in view of the opportunity for argument afforded both in the district court and here, that this is a grievance to be considered. The "judicial officer" was entirely right in not accepting the stipulation as final. It attempted to put a gloss upon the Regulation and the Regulation had the force of law. The duty of courts is to administer rights and obligations as they exist, not as the parties may choose to substitute others.<sup>7</sup> Provided fair opportunity be given to meet any change of front which arises out of the repudiation of the agreed interpretation, the party who suffers from it has no ground for complaint; and the doctrine is especially reasonable when, as here, the repudiation is by a succeeding official who differs with his predecessor.

[21] The plaintiff goes further, however, and asserts that there had been earlier interpretations in its favor, judicial and administra-

<sup>7</sup> *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U. S. 281, 289, 37 S. Ct. 287, 61 L. Ed. 722; *Estate of Sanford v. Com'r*, 308 U. S. 39, 41, 60 S. Ct. 51, 84 L. Ed. 20; *Cloverleaf Co. v. Patterson*, 815 U. S. 148, 151, 152, 62 S. Ct. 491, 86 L. Ed. 754.



tive, which we ought to follow. In *Vogt's Dairies, Inc. v. Wickard*<sup>8</sup> Judge Mandelbaum held that, for the purpose of obtaining a credit in the "producer-settlement fund," a "handler" should not be considered such as to transactions in an "unapproved plant." Whether this decision was meant to extend to classification under III-D might be debated; but, if it was, we cannot assent for the reasons we have given. As an administrative interpretation, the plaintiff invokes another "memorandum" which Harmon issued in December, 1938, in which he ruled that "when a plant is not approved for the marketing area the dealer is not considered a handler at that plant." This was issued only a few months after the Regulation itself was promulgated, and at a time when, in the nature of things, interpretation was tentative, or, if it was not, ought to have been. We are indeed aware how great an advantage familiarity with the multifarious ramifications of such a subject as milk regulation gives to administrators, and how much less favored are we who must plunge into it unequipped. Nevertheless, we should have to endow them with almost supernatural powers, if they were not, like ourselves, at the outset stunned and confounded by the fantastic proliferation which emerges, when one attempts to find a path through such verbal mazes. We are satisfied that the second thought of the Administrator was better [66 †] than his first; and we do not feel bound to accept the early ruling.

[22, 23] The plaintiff asserts in its brief that it relied upon the "memorandum" of December, 1938, which defined "not a handler," and that, because of it, it conducted its business as it would not otherwise have done. This it calls an "estoppel." It is true that in cases of doubtful interpretation, long usage in reliance upon an administrative interpretation often counts for much.<sup>9</sup> We need not say how far we should feel bound by the interpretation if the plaintiff had proved that it did conduct its business in reliance upon the "memorandum" during the period in question. Be that as it may, there is not a syllable of such evidence in the record, although, as we have said, the "judicial officer" gave ample warning of what might be his eventual ruling. Nor did the plaintiff ask to be allowed to put in such proof, even after the report was filed. We cannot accept as an equivalent the bare assertion in the brief; nor would it be just now to send the cause back to try out an issue which would presumably lead far afield.

[24, 25] Next the plaintiff complains of the exclusion of an exhibit which was designed to show, and which, we may assume, did show,

† Italic figures in brackets refer to first word beginning a page in 173 F. 2d.—Ed.

<sup>8</sup> D. C., 45 F. Supp. 94.

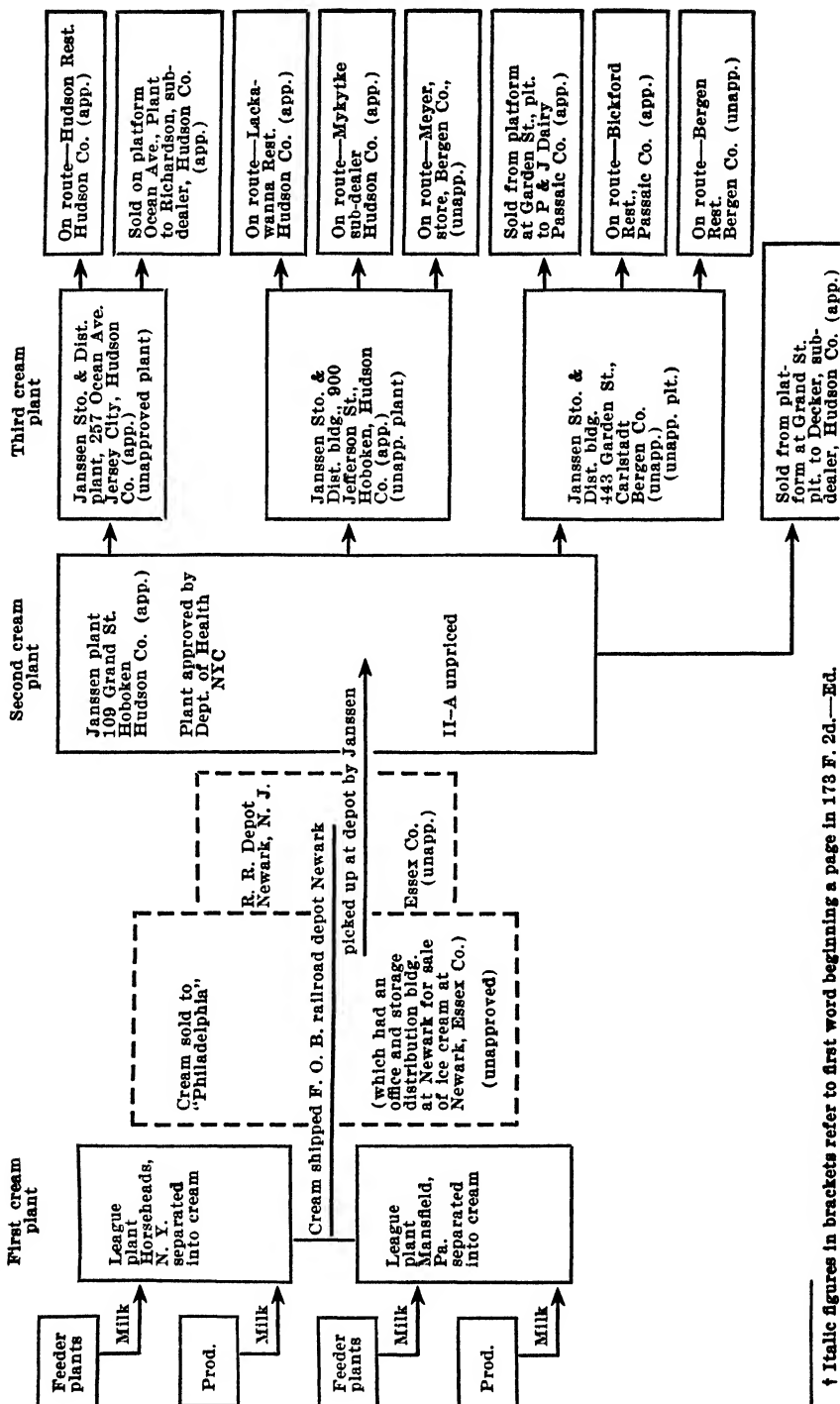
<sup>9</sup> *California v. Desert Water, Oil & Irrigation Company*, 243 U. S. 415, 421, 37 S. Ct. 394, 61 L. Ed. 821.

the facts necessary to determine "the Class II-A (unpriced) cream price and \* \* \* comparable prices between such prices in the New Jersey markets" after the Regulation went into effect. The object of this was, and could only be, to prove that the Regulation did not operate as it was designed to do, and that, as construed, it was unreasonable. It is, of course true that when alternative interpretations are possible, the more reasonable of the two is to be chosen; but the test of what is reasonable must be based upon what was before the draughtsmen of the Regulation, for their intent is a past fact, not determined or determinable by future events. Such evidence could not possibly have any bearing upon its meaning; it would only show that the purpose sought to be realized was not in fact realized; and purpose and realization are totally different things. The plaintiff does indeed suggest, but only in an indirect way, that, if construed as we are construing it, the Regulation is invalid. Plainly, we are in no position to decide that question. The Regulation was the result of long investigation and deliberation; and the evidence on which it was based is not before us. As upon the issue that it acted upon the faith of the Harmon "memorandum," the plaintiff had its opportunity to challenge the validity of the Regulation. It preferred not to try out that question, when that course was open. It would be to the last degree unjust, now that it has failed, to reopen the proceeding and go through a long consideration of issues, many of which have in any event been superseded by the amendment of 1940. The regulation of an industry such as this—indeed of any modern industry—is an undertaking of monstrous difficulty; it yet remains to be seen whether success is within the compass of human abilities. Those charged with such duties must proceed as best they can, correcting their initial blunders, as experience teaches; some ineptitudes and some injustices are inevitable at the start; they are the price of the undertaking as a whole.

Finally, the plaintiff complains that the administration of the Regulation has been unequal and inconsistent; not, as we understand, because it was deliberately partial, but because it has been wayward and vacillating. The plaintiff cannot, however, become the vicarious champion in its own interest of imperfections in the discharge of the Secretary's duties. If he has correctly interpreted his powers in dealing with it, and imposed upon it no greater obligations than were lawful, it is no answer that others have fared better; any more than when burdens have been unequally imposed by the mistakes of courts of law.

Judgment affirmed.

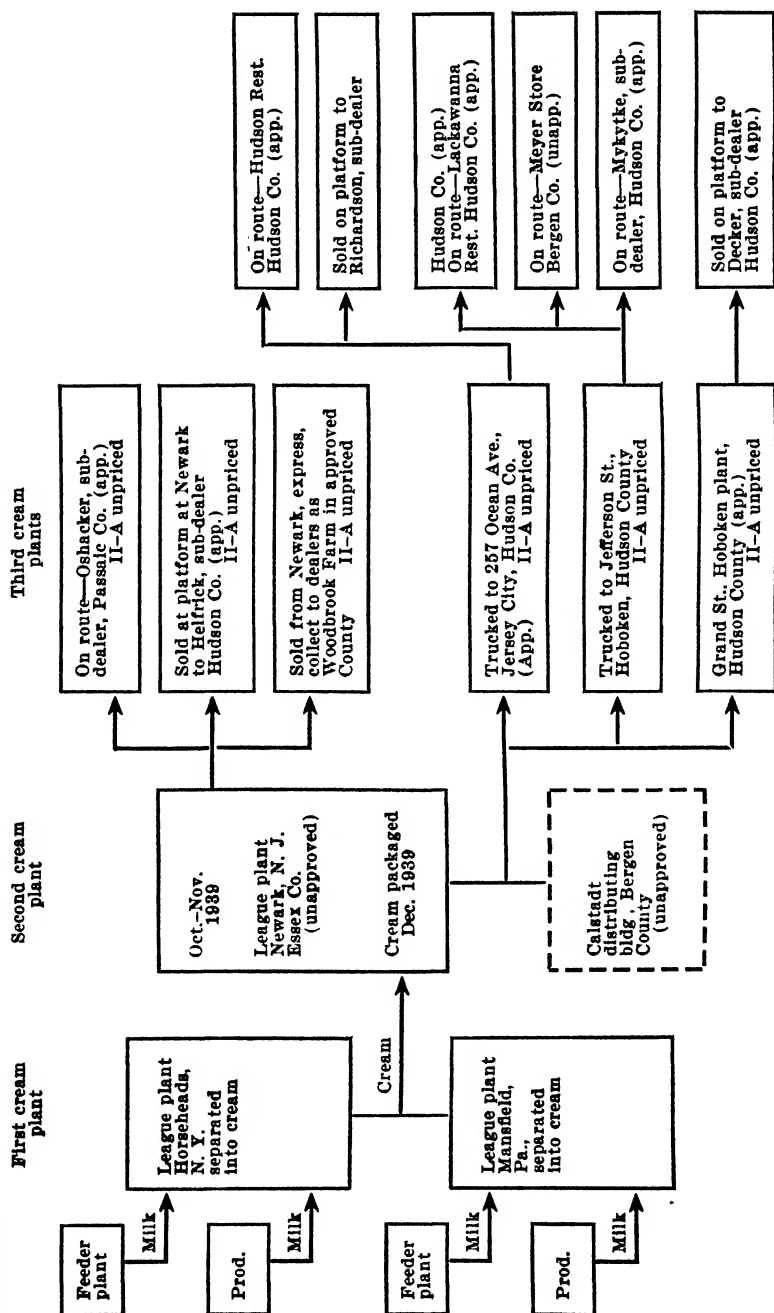
[1971] Claim No. 2



† Italic figures in brackets refer to first word beginning a page in 173 F. 2d.—Ed.

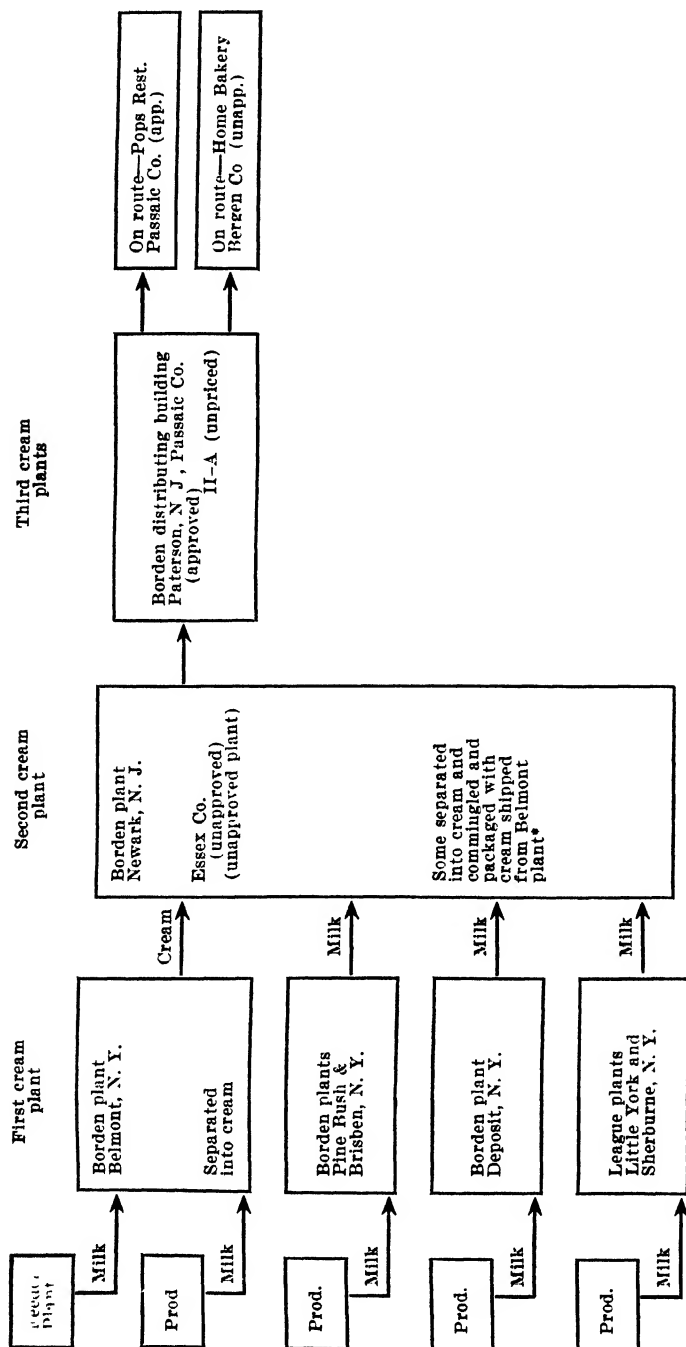
173 F. 2d 57

[1961] Claim No. 2



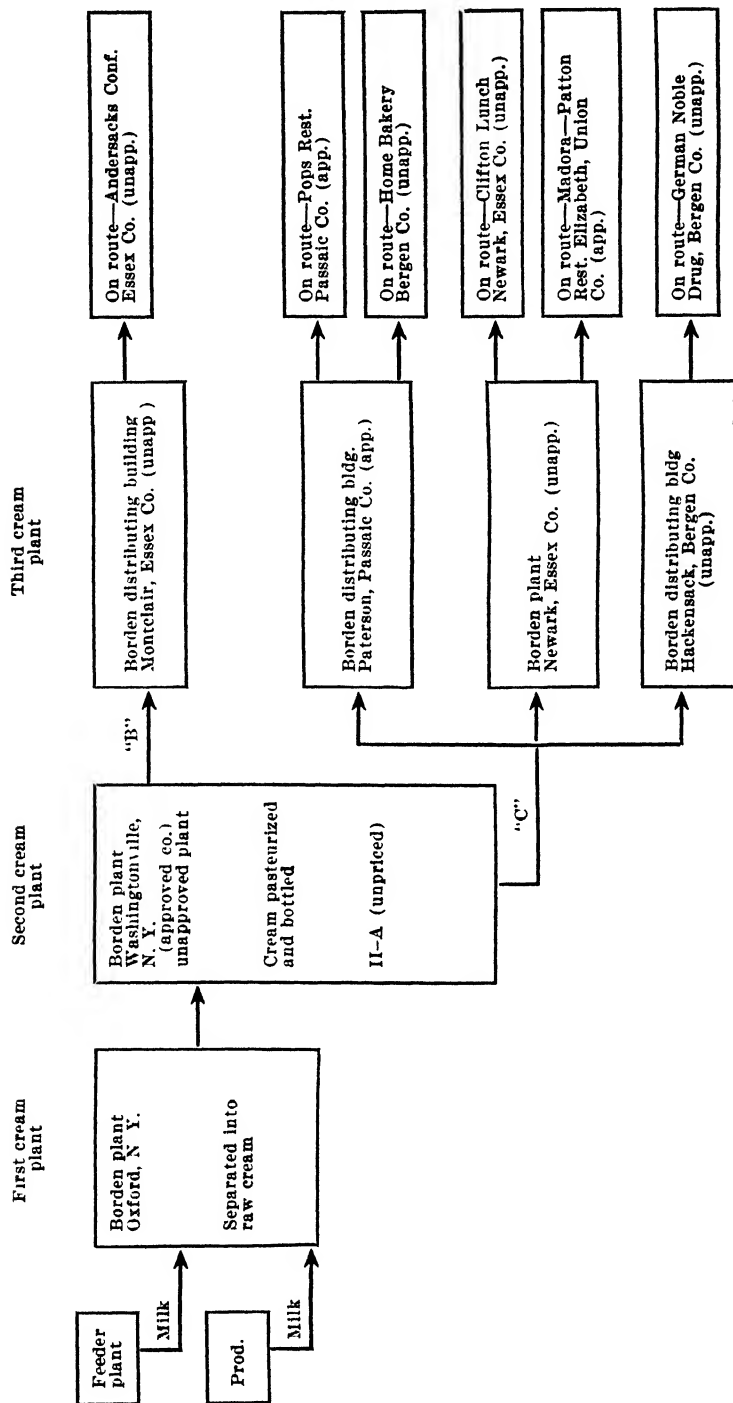
† Italic figures in brackets refer to first word beginning a page in 173 F. 2d.—Ed.

[69] Claim Nos. 3 &amp; 4, "A"



\*None of this milk was reclassified by the Market Administrator in November 1939

173 F. 2d 57



[704] Claim Nos. 3 &amp; 4, "B" &amp; "C"

†Italic figures in brackets refer to first word beginning a page in 173 F. 2d—Ed.

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Where complainant contracted late in the season to sell to respondent a carload of "fresh pack" apples and respondent unloaded the apples 5 days after arrival, placed them in cold storage, and later complained of excessive decay, held, that respondent has failed to show that complainant breached the contract since the decay was due to the nature of the apples and the manner in which they were handled by respondent and, therefore, complainant should be awarded reparation in the amount of the unpaid balance of the purchase price. . . . 2332 123

Where complainant sold vegetables to respondent and advanced money to it, but respondent failed to pay the full purchase price and repay complainant the cash advanced for respondent to pay its driver, and respondent failed to file an answer, held, that its failure to file an answer admits the facts alleged in the complaint, and complainant should be awarded reparation in the amount of the unpaid balance of the purchase price but complainant could not recover for the personal loan, since the latter is not within the purview of the act and therefore not within the jurisdiction of the Secretary. . . . 2336 134

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We are indeed aware how great an advantage familiarity with the multifarious ramifications of such a subject as milk regulation gives to administrators, and how much less favored are we who must plunge into it unequipped. Nevertheless, we should have to endow them with almost supernatural powers, if they were not, like ourselves, at the outset stunned and confounded by the fantastic proliferation which emerges, when one attempts to find a path through such verbal mazes, 173 F. 2d 57.....

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**MANUFACTURER—PRODUCER—BANKER—LAWYER  
TEACHER—STUDENT—AVERAGE CITIZEN**

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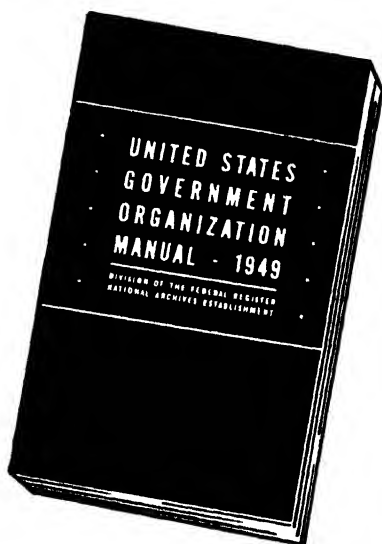
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**UNITED STATES DEPARTMENT OF AGRICULTURE**

# **AGRICULTURE DECISIONS**

**DECISIONS OF THE SECRETARY OF AGRICULTURE**

**UNDER THE  
REGULATORY LAWS ADMINISTERED IN THE  
UNITED STATES DEPARTMENT OF AGRICULTURE**

**(Including Court Decisions)**



**IN  
THIS  
ISSUE**

**SUPREME COURT DECISION  
SECRETARY OF AGRICULTURE v. CENTRAL  
ROIG REFINING CO., p. 261, (VALIDITY OF  
THE SUGAR ACT OF 1948)**

**VOL. 9, No. 2  
(Nos. 2341-2365)  
PAGES 185-290**

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## PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered in the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial (as contrasted with quasi-legislative) character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for hearing have been given. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register. For reasons of policy, the identities of the parties are not reported in decisions issued under one statute which expressly authorizes, but does not require the publication of the facts and circumstances of a violation, unless the Secretary in his decision has specifically ordered or directed such publication.

The principal statutes concerned are the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 1946 ed. 601 *et seq.*), the Commodity Exchange Act (7 U. S. C. 1946 ed. 1 *et seq.*), the Grain Standards Act (7 U. S. C. 1946 ed. 71 *et seq.*), the Packers and Stockyards Act, 1921 (7 U. S. C. 1946 ed. 181 *et seq.*), and the Perishable Agricultural Commodities Act, 1930 (7 U. S. C. 1946 ed. 499a *et seq.*).

The decisions published are numbered serially, in the order in which they appear herein, as "Agriculture Decisions". They may be cited by giving the volume and page, for illustration, thus: 1 A. D. 472. It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D-578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in the Agriculture Decisions.

Current court decisions involving the regulatory laws administered by the Department will be published herein.

An Index-Digest and Subject-Index of the decisions reported and the court cases published herein will be found at end of each monthly issue, and the cumulative yearly Index-Digest, lists of decisions reported, statutes, orders, etc., construed, and statistical and other tables will be found at the end of No. 12 (December) issue of the Agriculture Decisions.

Copies of monthly issues beginning with January 1942 of the decisions will be available through the Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C.



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\*HISTORICAL NOTE —The Secretary's decision in *In re Thatford Live Poultry, Inc.*, 1 A. D. 435, decided June 3, 1942, overruled prior decisions (Table of Decisions Overruled, 1 A. D. 819) as precedents because of lack of regulation requiring current assets to exceed current liability by at least 25 percent of average weekly purchases. Since that decision, regulation (9 CFR Cum. Supp. 201.14) setting up a standard of financial qualifications has been promulgated. *In re Albert Bree*, 3 A. D. 255 (1944).—Ed.

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\*Certiorari denied by the Supreme Court on December 6, 1948, 335 U. S. 885.—Ed.



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**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**  
**AGRICULTURE DECISIONS**

(No. 2341)

*In re* Crystal Lake Dairy Company and Momence Milk Cooperative Association. AMA Doc. No. 41-26. Decided February 10, 1950.

**Validity of Amendment to Order No. 41**

Where petitioners claimed that the amendment to Order No. 41 effective November 1, 1947 was invalid for various reasons, which amendment provided that milk or cream which was moved outside the "surplus milk manufacturing area" would be priced at 60 cents per hundredweight over the minimum price for Class I and Class II milk which was not so moved, the amendment in question having been in effect only for the month of November 1947 for the purpose of alleviating a shortage of milk in the marketing area, it is held, that the points raised by petitioners are untenable, the amendment is valid and the relief requested by them should be denied.\*

**Adequacy of Hearing Notice**

Where petitioners knew the purposes of the proposed action and, in general, the considerations involved and were not misled to their detriment by the fact that the hearing notice did not set out the amendment as finally made effective, and the amendment carried out the purposes of the proposals in the notice of hearing, although such proposals were modified, it is held, that the notice of the promulgation hearing was adequate and valid.\*

**Omission of Recommended Decision and Opportunity for Filing Exceptions  
Justified by Existence of Emergency**

Where the Secretary found that the due and timely execution of the functions of the Secretary of Agriculture imperatively and unavoidably required the omission of a recommended decision by the Assistant Administrator and opportunity for exceptions thereto, and set forth his reasons therefor, it is held, that the evidence in the record is sufficient to support the finding of the Secretary, and the fact that similar situations may have existed in the past and no action was taken to alleviate them does not prevent the Secretary, when presented with a new situation, to determine that the new situation constitutes an emergency.\*

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

### **Finding of Secretary in Accordance With Section 8 (a) of Administrative Procedure Act**

**Finding of Secretary**, when presented with a new situation that it constituted an emergency, is fully in accordance with the requirements of section 8 (a) of the Administrative Procedure Act.\*

### **Sufficiency of Evidence to Support Amendment to Order No. 41**

Secretary is not limited in his determination of a price which will secure an adequate supply of milk and be in the public interest to the acceptance of a figure which some witness may have testified was the necessary amount of increase where the evidence supporting the greater amount is sufficient to support the amount which the Secretary determined to be appropriate in the public interest.\*

### **Adoption of Surplus Milk Manufacturing Area—Feasibility of Administrative Plan**

Under the circumstances, although no witness advocated the surplus milk manufacturing area, the Secretary was authorized to adopt a plan which appeared to him to be more feasible administratively and which would accomplish the desired purposes.\*

### **Amendment to Order No. 41 Increasing Price of Milk for Class I and II Not Involving Unlawful Discrimination**

Where the decision of the Secretary set out the reasons for increasing the price for Class I and Class II milk moved to distant markets while not doing so for milk utilized in the surplus manufacturing area or the marketing area, there was no unlawful discrimination, since substantial reasons for different treatment for the different situations existed.\*

### **Amendment to Order No. 41 Exempting Direct Route Sales Not Involving Unlawful Discrimination**

Amendment to Order No. 41 exempting direct route sales from plants located within the surplus marketing area does not involve unlawful discrimination since it is administratively difficult under such circumstances to separate deliveries outside the surplus marketing area from those within, and these route sales represent regular distribution which is not of a seasonable character.\*

### **Amendment to Order No. 41 Not Violating "Uniform" Classification and Pricing Requirements of Section 8c (5) (A) of Act**

The pricing of milk higher for areas outside the marketing area and the surplus marketing area does not violate the uniform classification and pricing requirements of section 8c (5) (A) of the act, and the authority to fix such pricing of milk is well established by court decision.\*

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

**Amendment to Order No. 41 Not Invalid Because Affecting Existing Contracts**

It is well settled that a regulation otherwise valid does not become invalid because it affects or cuts across existing contracts.\*

**Amendment to Order No. 41 Not Violating Section 8c (5) (G) of Act**

Amendment to Order No. 41 does not violate section 8c (5) (G) of the act inasmuch as this section is applicable where there is a question as to a marketing agreement or order for a marketing area excluding milk, or limiting the marketing of milk products, originating in a supply area other than for the marketing area, whereas petitioners' objections relate to alleged limitations upon the exportation of milk from the supply area to a distant marketing area.\*

**Amendment to Order No. 41 Not Involving Preference Violative of Federal Constitution**

The amendment to Order No. 41 gives no preference to the ports of one state over those of another and, therefore, is not violative of Article I, Section 9, Clause 6, of the Constitution of the United States.\*

*Mr. John J. Toohey, of Chicago, Illinois, for petitioners. Messrs. Julius C. Krause and John G. Liebert for Production and Marketing Administration. Mr. Earl J. Smith, Hearing Examiner.*

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a proceeding under Section 8c (15) (A) of the Agricultural Adjustment Act (1933), as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 601 *et seq.*). Petitioners are handlers subject to Order No. 41, as amended, which regulates the handling of milk in the Chicago marketing area.

In their amended petition, the petitioners claimed that an amendment to Order No. 41 effective November 1, 1947 (7 CFR, 1947 Supp., 941.5), was invalid for various reasons. The amendment in question provided that milk or cream which was moved outside the "surplus milk manufacturing area" would be priced at 60 cents per hundred-weight over the minimum price for Class I and Class II milk which was not so moved. The amendment was in effect only for the month of November 1947 and was designed to alleviate a shortage of milk in the marketing area (12 F. R. 7008 *et seq.*). The petitioners alleged, on information and belief, that the amendment was invalid because the Secretary of Agriculture had not personally heard or read the testimony and examined and considered the exhibits received in evidence at the promulgation hearing and the written arguments and sugges-

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

tions filed in connection with the hearing. The respondent filed its motion to dismiss the petition as to these allegations and that motion was granted by the Judicial Officer (8 A. D. 1 (1949)). Respondent answered as to the other allegations of the petition. Thereafter, by agreement of the parties, it was ruled at a prehearing conference by Earl J. Smith, Hearing Examiner, that the record of this hearing should consist of copies of the pleadings herein including the order of the Judicial Officer on the motion to dismiss, a copy of the record of the hearing held on proposed amendments to the Chicago marketing order at Chicago, Illinois, on September 24 and 25, 1947 (Docket AO 101 A-7), together with all exhibits attached thereto, including the notice of hearing published in the Federal Register on September 20, 1947 (12 F. R. 6299), a copy of the decision of the Secretary of Agriculture which was issued with respect to the aforesaid proposed amendments on October 23, 1947 (12 F. R. 7008), and a copy of the order issued by the Acting Secretary of Agriculture on October 31, 1947 (12 F. R. 7248), amending Order No. 41, as amended. Briefs were filed by both parties but no specific suggested findings of fact were submitted. Earl J. Smith, Hearing Examiner, issued a report recommending denial of the relief requested by the petitioners. The petitioners filed exceptions to the report and requested oral argument. They later waived oral argument.

The points raised by petitioners are:

- (1) The adequacy of the notice of the promulgation hearing.
- (2) The existence of an emergency justifying the omission of the recommended decision with opportunity to file exceptions thereto.
- (3) The sufficiency of the evidence to support the amendment.
- (4) The justification for adopting the surplus milk manufacturing area for the purposes of the amendment.
- (5) Whether unlawful discrimination was involved in the amendment.
- (6) Whether any unlawful restraint was imposed on the movement of milk from one production or marketing area to another.
- (7) Whether there was unlawful restraint of commerce among the states.

Petitioners ask that the amendment be declared unlawful and that the market administrator be directed to refund to them such sums as they may have paid to the market administrator pursuant to the amendment.

#### FINDINGS OF FACT

1. The petitioner, Momence Milk Cooperative Association, is a corporation under the laws of the State of Illinois. The officers of the association at the time of filing its petition were:

Conrad Kellner, President, Rensselaer, Indiana  
Fred Tanner, Vice President, R. F. D., Kankakee, Illinois  
John Spence, Secretary, R. F. D., Kankakee, Illinois  
Ed Frey, Treasurer, Remington, Indiana

2. The petitioner, Crystal Lake Dairy Company, is a business of which E. J. Connelly, Crystal Lake, Illinois, is the sole proprietor.

3. Petitioners are handlers of milk subject to Order No. 41.

4. A public hearing was held on September 24 and 25, 1947, at Chicago, Illinois, pursuant to notice published in the Federal Register on September 20, 1947 (12 F. R. 6299). After the hearing an opportunity for the filing of proposed findings and briefs was afforded interested parties, and on October 23, 1947, the Secretary of Agriculture issued his final decision (12 F. R. 7008), having found that an emergency existed which justified the omission of a recommended decision and an opportunity to file exceptions thereto. Thereafter the amendment was made effective November 1, 1947.

5. At the hearing preceding the issuance of the contested amendment, witnesses testified in detail that there was an existing or impending shortage of milk for the marketing area during the short supply season (H. R. 43 *et seq.*, 98, 128, 150 *et seq.*, 169 *et seq.*, 173 *et seq.*, 243 *et seq.*). The hearing record also showed that during an acute shortage in August 1947 and during similar shortages in other years, large quantities of fluid milk and cream subject to the Chicago order were sent to markets not related to the Chicago milkshed or marketing area (H. R. 131, 161, 194-195, 245-246, Exhibits 3, 8). These outside shipments increased in volume as shortages in Chicago became more acute but decreased to relatively insignificant amounts in the flush months when excess milk became burdensome in the Chicago milkshed (H. R. 66, 191-198, Exhibits 3 and 6).

6. Most of the witnesses at the hearing were of the opinion that the order should be amended to provide for direction of a greater proportion of the total milk supply produced for the marketing area to the Class I and Class II needs of the marketing area during the short supply season. The proposals in the notice of hearing and the modifications of these proposals at the hearing sought to accomplish this objective. One proposal considered at the hearing was for an increase of 84 cents per hundred pounds (the difference between Class I and Class IV prices during certain months) on all Class I and Class II milk sold beyond 150 miles of Chicago whenever, before December 31, 1947, an industry committee and the market administrator acting in concert proclaimed an emergency. Another proposal considered at the hearing provided for the addition (effective through November 30, 1947) of \$1.13 per hundred pounds to the prices of all bulk milk

and cream sold by a handler to a nonhandler beyond 100 miles from Chicago. The amendment made effective after the decision referred to in Finding of Fact 4 provided in effect that for the month of November 1947 the price of milk moved as Class I and Class II outside of the surplus marketing area should be increased by 60 cents per hundred-weight.

### CONCLUSIONS

#### Adequacy of the Hearing Notice

Petitioners' first objection as to the inadequacy of the hearing notice is that they did not receive *actual* notice or opportunity for actual notice of the amendment hearing not less than three days prior to the date fixed for the hearing. Section 8c(17) of the Agricultural Marketing Agreement Act (7 U. S. C. 608c(17)) provides that notice of a hearing upon a proposed amendment to an order issued pursuant to section 8c given not less than three days prior to the date fixed for such hearing shall be deemed due notice thereof. That act does not specify how notice shall be given. The Federal Register Act (44 U. S. C. 301 *et seq.*) makes the filing of a notice with the Division of the Federal Register sufficient to give notice of the contents thereof to any person affected thereby, except in cases where notice by publication is insufficient in law. It seems apparent that notice by publication in the Federal Register should be regarded as legally sufficient in a rule-making proceeding such as that involved where a public hearing is to be held and many of the interested parties entitled to be heard may be unknown. In this case, the notice of hearing was published in the Federal Register on September 20, 1947, and the hearing was held on September 24 and 25, 1947. Thus, the hearing seems to have been held in compliance with law.<sup>1</sup>

Petitioners also contend that the various changes in the proposals which were advanced at the hearing rendered the notice insufficient.<sup>2</sup> Petitioners agree with the rule laid down in the case of *United States v. Wrightwood Dairy Company*, 127 F. (2d) 907, that the proposal in a notice of hearing and the amendment adopted need not be identical. In that case the court said that:

"If the purpose of the hearing was clear and everyone knew of the general considerations no more was needed."

In this case the purpose of the original proposals was to induce handlers, during the period of shortage, to reduce the movement of

<sup>1</sup> The promulgation record of the amendment hearing does not contain any protest by petitioners' counsel as to the lack of timeliness of the notice of hearing. Petitioners' brief in this proceeding admits that petitioners received copies of the notice of hearing by mail on September 22, 1947.

<sup>2</sup> Petitioners' counsel at the hearing did not seek a recess for the purpose of preparing evidence on the proposals or changes in the proposals.

milk away from the Chicago and Suburban Chicago marketing area where it was needed for Class I and Class II uses. This was to be accomplished by making it economically disadvantageous for handlers to ship milk to distant points during the period of short supply. The original proposals contained in the notice suggested suspension from the pool or increased cost of milk purchased by handlers from producers as a means of securing the desired result. The amendment adopted increased prices as an appropriate means. The prices adopted were not those suggested in the notice of hearing but the Secretary is not limited to either accepting the proposed prices or, if he finds such prices inappropriate on the evidence in the record, calling a new hearing before he can take the necessary action. The amendment, as promulgated, was not as restrictive as those proposed in the notice of hearing in that it enlarged the area in which milk could be distributed without the additional cost of such milk to the handlers. We are of the opinion that the petitioners knew the purposes of the proposed action and the general considerations involved and were not misled, to their detriment, by the fact that the notice did not set out the amendment as finally made effective. The amendment carried out the purposes of the proposals in the notice of hearing, although such proposals were modified.

#### **Existence of an Emergency**

The Secretary found that the due and timely execution of the functions of the Secretary of Agriculture imperatively and unavoidably required the omission of a recommended decision by the Assistant Administrator and opportunity for exceptions thereto, and set forth his reasons therefor, namely, that the critical period for the remainder of 1947 was shown to be the months of October and November, and the delay necessarily involved in the preparation, filing, and publication of a recommended decision with opportunity for exceptions thereto, would defeat the purpose of the amendment for a considerable part of this period. As it was, the amendment could only be made effective in time to operate during the month of November. If there was urgent need for the amendment, it is apparent that the finding of the Secretary in this regard was justifiable for otherwise the timely execution of the amendment was impossible. There is evidence in the record that some handlers in the Chicago area were experiencing difficulty in meeting the requirements of consumers for Class I and Class II milk at the time of the hearing and that the normal decline in milk production during October and November pointed to a lack of milk supply sufficient for those uses in the area unless action was taken to channel more of the milk supply into those uses. There was evidence indicating that there would be a very "tight" situation in the



supply of milk in the market during October and November, 1947. We are of the opinion that the evidence in the record was sufficient to support the finding of the Secretary. The fact that similar situations may have existed in the past and no action was taken to alleviate them does not convince us that, when presented with a new situation, the Secretary was not justified in concluding that it constituted an emergency. The finding is fully in accordance with the requirements of Section 8(a) of the Administrative Procedure Act (5 U. S. C. 1008 (a)) and Section 900.12(d) of the Promulgation Regulations (7 CFR 900.12(d)).

#### **Sufficiency of the Evidence to Support the Amendment**

The evidence referred to in Findings of Fact 5 and 6 and discussed in the decision of the Secretary (see Finding of Fact 4) is substantial and, of course, adequate to support the amendment. There is evidence in the record that a shortage of milk was to be expected in November and that if the milk which handlers were shipping to distant markets were available to the Chicago area, it would alleviate the situation. There is evidence in the record that handlers, during the thirty days prior to the hearing, had been paying premiums as high as 95 cents per hundredweight to secure milk for the area and still were sometimes unable to secure sufficient milk. There was evidence that 84 cents per hundredweight was the amount necessary to increase the then established price in order to secure the desired results. The Secretary determined that 60 cents was the proper additional price to be placed on the outside sales to accomplish this result. Petitioners argue that as there is no evidence in the record specifically designating 60 cents as a proper price to be added on outside sales, there is no evidence supporting the 60 cents increase. We do not think that the Secretary is limited in his determination of a price which will secure an adequate supply of milk and be in the public interest to the acceptance of a figure which some witness may have testified was the necessary amount of increase. The Secretary has authority to fix an amount less than that which any witness considers to be the proper amount. The evidence supporting the greater amount is sufficient to support the amount which the Secretary determines to be appropriate in the public interest. The Secretary is not limited either to giving no relief or fixing prices which he considers unnecessarily high.

#### **Adoption of the Surplus Milk Manufacturing Area**

The use of the surplus milk manufacturing area instead of the Chicago marketing area, the suburban marketing area, or the 100 or 150-mile zones made the amendment less restrictive as it enlarged the

area in which the increased price would not be applicable. The matter was discussed at the hearing and the use of the enlarged area seems to have been adopted largely as a matter of administrative convenience because it was an established area under the order and its use would avoid the possibility of any inconsistencies with other provisions in the amended order. The adoption of the area as a matter of administrative convenience does not of itself raise any question of illegality. The real question is whether the use of the area is covered by the notice of hearing, which we have before considered, and is supported by evidence in the record. There is evidence in the record that the use of the surplus milk manufacturing area instead of the 150-mile area would make little difference in the effectiveness of the amendment in accomplishing the objective sought, and that it might avoid inconsistencies in the order, as amended, which could not be remedied in the hearing then being held. There is no evidence that the enlargement of the area under consideration would adversely affect anyone. Under these circumstances, we think that, although no witness advocated the area, the Secretary of Agriculture was authorized to adopt a plan which appeared to him to be more feasible administratively and which would accomplish the desired purposes.

#### **Unlawful Discrimination**

In this connection, petitioners contend that the amendment is unlawfully discriminatory because it prices milk higher for areas outside the surplus marketing area than for the surplus manufacturing area and the marketing area and because it gives special treatment to milk sold to soup, candy, and bakery goods manufacturers. Unlawful discrimination is absent where substantial reasons for different treatment for different situations exist. The decision of the Secretary sets out the reasons for increasing the price for Class I and II milk moved to distant markets while not doing so for milk utilized in the surplus manufacturing area or the marketing area. These reasons are sufficient to justify the difference in pricing between the distant areas on the one hand and the surplus marketing area and the marketing area on the other hand. As to the possible alternative of diverting milk from soup, candy, and bakery uses to fluid utilization, the action taken is supported by substantial evidence in the record and as shown by the Secretary's decision was determined to be the more appropriate method of meeting the emergency for the month of November.

Petitioners also complain that the amendment exempted direct route sales from plants located within the surplus marketing area. As stated in the Secretary's decision, the volume of such sales is small, it is administratively difficult under such circumstances to separate deliveries outside the surplus marketing area from those within, and

these route sales represent regular distribution which is not of a seasonal character. The exemption is patently justifiable.

Petitioners contend in addition that the pricing of milk higher for areas outside the marketing area and the surplus marketing area violates the "uniform" classification and pricing requirements of section 8c (5) (A) of the act. In numerous instances, orders issued under the act have classified and priced milk and milk products differently for different areas of utilization. The authority to do so is well established and this argument of petitioners is without merit. See e. g. *United States v. Rock Royal Cooperative, Inc., et al.*, 307, U. S. 533 (1939).

Finally, petitioners claim that the amendment is invalid because petitioners had pre-existing contracts for distribution outside the surplus manufacturing area which were adversely affected by the amendment. Neither in this proceeding nor in the proceeding preceding the issuance of the amendment did petitioners introduce in evidence the terms of the contracts. But aside from this, it is now accepted law that a regulation otherwise valid, does not become invalid because it affects or cuts across existing contracts.

#### **Unlawful Restraint Upon the Movement of Milk From One Production Area to Another**

As they also claimed in the proceeding antecedent to the issuance of the amendment, petitioners urge that the amendment violates section 8c (5) (G) of the act. This section provides that "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

Petitioners' invocation of this part of the act seems out of place. From the statutory language quoted and from the opinions in *Bailey Farm Dairy Company et al. v. Anderson*, 157 F. (2d) 87 (C. C. A. 8th, 1946), and *In re Babylon Milk and Cream Company*, 8 A. D. 1083 (1949), it seems clear that this part of the act is for application where there is a question as to a marketing agreement or order for a marketing area excluding milk, or limiting the marketing of milk products, originating in a supply area other than that for the marketing area, in other words, a question as to restriction upon the *importation* of milk or milk products. Petitioners' objections here relate to alleged limitations upon the *exportation* of milk from the supply area to a distant marketing area. Insofar as petitioners seem to contend unconstitutionality or invalidity generally for any limitation upon the movement of milk or milk products in interstate commerce, this argu-

ment has been examined and invalidated in the *Bailey Farm* decision, *supra* (p. 97).

Petitioners argue that the amendment violates Article I, Section 9, Clause 6 of the Constitution of the United States which provides that "No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another." Petitioners say that a handler subject to the order may dispose of milk in Milwaukee, Wisconsin, which costs him less under the amendment than milk disposed of in St. Louis, Missouri. That this provision has no application here is apparent, for the amendment gives no preference to the ports of one state over those of another. *Bailey Farm Dairy Company et al. v. Anderson, supra*. Nor can it properly be said that the order, as amended, unlawfully prices milk sold anywhere in the universe. The order applies only to milk approved for the Chicago marketing area.

In view of the foregoing, the relief requested by petitioners should be denied.

#### ORDER

The relief requested by petitioner is denied and the petition is dismissed.

(No. 2342)

*In re* DeCoursey Cream Company, Inc. AMA Doc. No. 68-2. Decided February 20, 1950.

#### Order No. 68—Classification of Milk—"Ungraded" Milk

Where petitioner, a handler subject to Order No. 68 regulating the handling of milk in the Wichita, Kansas Milk Marketing Area, complained in its petition that the Market Administrator erroneously reclassified petitioner's "ungraded" milk as Class I requiring a higher assessment, for the period December 1946 through April 1947, on the ground that "ungraded" milk was not regulated by the Order, it is held, that since the difference in production costs should be reflected in light of prevailing prices for milk eligible for Wichita distribution, called "graded" milk, than for other milk, called "ungraded" or "C" milk, there was no error in Market Administrator's ruling and therefore, the relief requested by petitioner should be denied and the petition dismissed.\*

#### Allocation Method of Classification of Milk Authorized by Law

Where, as here, a handler has both "graded" and "ungraded" milk, the method of classification prescribed by Order No. 68 is allocation, and, regardless

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

of whatever other method might have been used, the allocation method prescribed is authorized by law.\*

#### **Insufficiency of Books and Records to Support Class III Utilization**

Petitioner's records, required by provisions of Order No. 68, relative to disposition of its shipments of milk referred to in Finding 2, even as they may be considered as supplemented by information subsequently obtained, held, were not sufficient to support petitioner's claimed Class III utilization.\*

*Foulston, Siefkin, Schoeppel, Bartlett & Powers*, of Wichita, Kansas, for petitioner. *Mr. John G. Liebert* for Production and Marketing Administration. *Mr. Jack W. Bain*, Hearing Examiner.

*Decision by Thomas J. Flavin, Judicial Officer*

#### **PRELIMINARY STATEMENT**

This is a proceeding under Section 8c (15) (A) of the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 601 *et seq.*), involving the validity of acts of the market administrator of Order No. 68 (7 CFR, 1944 and 1945 Supps., Part 968), which regulates milk handling in Wichita, Kansas. On May 19, 1948, DeCoursey Cream Company, Inc., a handler under Order No. 68, filed a petition alleging that assessments made against it by the market administrator in connection with "ungraded" milk were unlawful. On June 14, 1948, an Assistant Administrator of the Production and Marketing Administration filed an answer in opposition. On December 29, 1948, the proceeding was assigned to Hearing Examiner Jack W. Bain, who set it for hearing in Wichita on January 18, 1949.

At the hearing, George B. Powers of Poulston, Siefkin, Schoeppel, Bartlett, and Powers, of Wichita, appeared for petitioner, and John G. Liebert of the Washington office, Office of the Solicitor, appeared for respondent. As there is no serious dispute of the material facts, they are set forth below under the Findings of Fact without being preceded here by a summary of the evidence supporting them.

After the hearing, petitioner filed requested findings and a brief on March 8, 1949. Respondent filed requests and brief on April 18, 1949. Petitioner filed no reply. In his report, the examiner recommended that the relief requested by the petition be denied and that the petition be dismissed. Petitioner filed exceptions to the report. These exceptions and the record have been examined but we agree with the recommendations of the examiner. Accordingly, this decision and order are substantially the same as recommended by the examiner.

#### **FINDINGS OF FACT**

1. Petitioner is DeCoursey Cream Company, Inc., a Kansas corporation, whose address is 1901 East Douglas Avenue, Wichita, Kan-

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

sas. It is a handler under Order No. 68, and operates a milk plant in Wichita at which it receives "graded" or "B" milk (milk approved by health authorities for distribution in Wichita) from "producers" as defined in the order, and "ungraded" or "C" milk from sources other than "producers." During the period here involved, its receipts and use of "ungraded" milk were about four times as large as of "graded" milk.

2. During the period December 1946 through April 1947, petitioner shipped from its Wichita plant quantities of "ungraded" milk to a purchaser in Albuquerque, New Mexico, and smaller quantities to purchasers in Pueblo, Colorado, and in Newton and Wellington, Kansas, all of such places being outside of the "marketing area" defined in Order No. 68. There is no dispute concerning the quantities of this milk.

3. All milk mentioned in Finding 2 was purchased, handled, and sold by petitioner as "ungraded" milk, was not commingled with "graded" milk, was sold at prices below those prevailing for "graded" milk, and was shipped in cans labeled or tagged to indicate it was "C" or manufacturing milk.

4. During the period involved, handlers were permitted by Wichita health authorities to use "ungraded" milk for distribution in Wichita if they would first use all of their "graded" milk for Wichita distribution and not ship out any "graded" milk. During this time, petitioner did not ship out any "graded" milk, nor could it have done so without violating its understanding with the health authorities as it then used some "ungraded" milk for Wichita cream.

5. In its report to the market administrator for December 1946, petitioner reported both "graded" and "ungraded" milk, reporting as in Class III the December shipments of "ungraded" milk mentioned in Finding 2.

6. For the other four months involved petitioner did not report the "ungraded" milk.

7. Petitioner made payments to the market administrator for the months involved on the basis of its reports mentioned in Findings 5 and 6.

8. When the market administrator made the usual examination of petitioner's records to verify its report for December 1946, he found no record showing how the milk shipped to Albuquerque, etc., had been used by the purchasers. He thereupon changed the reported Class III utilization of this milk to Class I, recomputed petitioner's obligation to the "producer-settlement fund" for the month, and billed petitioner for \$235.23.

9. After examinations for the other four months disclosed petitioner's unreported "ungraded" milk, and the absence of records showing how the shipments of milk had been used, the market administrator classified such milk as Class I, recomputed petitioner's obligations for those months, and billed petitioner for \$441.92 for January 1947, \$1,295.17 for February 1947, \$1,348.03 for March 1947, and \$1,198.98 for April 1947.

10. Petitioner, claiming that "ungraded" milk was not covered by Order No. 68, that such milk need not be reported, and that the additional billings were therefore unauthorized, refused to pay. Suit was brought in the United States District Court to compel payment, and the court ordered petitioner to file amended reports including "ungraded" milk, but further action has been stayed pending decision in this proceeding. Petitioner has filed the amended reports ordered by the court.

11. During the period here involved, Order No. 68 provided that all milk disposed of by a handler, regardless of its source, should be classified in the various use classifications, and that then the part of the milk which had been received from "producers" should be classified by allocating such part to the highest of the classifications determined for the total. The market administrator applied this provision in recomputing petitioner's obligations.

12. About January 1948 petitioner asked the Albuquerque purchaser how it had used the milk shipped to it, and was told that there were no records but that about a third of it had been used for fluid milk, a third for mix and a third for cottage cheese.

13. An auditor for the market administrator went to Albuquerque and Pueblo to ascertain the disposition of petitioner's shipments. The Albuquerque purchaser told the auditor that part was used for fluid milk, part for cream, and part for ice cream, but refused to show records. One purchaser at Pueblo said all was used in Class I, the other said about 35 percent was Class I and the rest was for butter, but neither showed any records.

14. Effective November 1, 1947, Order No. 68 was amended to provide, *inter alia*, that milk could be classified in Class III if shipped out and tagged under conditions substantially the same as apply to the shipments here involved (7 CFR, 1947 Supp., Part 968; 12 F. R. 7105).

### CONCLUSIONS

To produce milk that may be lawfully distributed in Wichita, dairy farmers must comply with sanitary rules and regulations, etc., of Wichita health authorities. Because of the additional care and equipment required, their cost of production is somewhat greater than it

would be if the milk were produced for some purpose other than Wichita distribution. It is only logical that the difference in production costs should be reflected in higher prevailing prices for milk eligible for Wichita distribution, called "graded" milk, than for other milk, called "ungraded" or "C" milk.

Order No. 68 prescribes minimum prices which milk dealers, called "handlers", must pay for milk they purchase from "producers", the word used in the order to mean dairy farmers approved by health authorities to produce milk for Wichita distribution. Petitioner contends that the order applies to "graded" rather than to "ungraded" milk, that "ungraded" milk is relevant only collaterally, and that "ungraded" milk need not be reported by the handler and should not be considered by the market administrator in computing what the handler should pay "producers."

Order No. 68 follows the general pattern of milk regulatory orders in pricing milk to handlers according to its use. That is, milk bottled and distributed for consumption as fluid milk is classified as Class I, the highest price classification, and milk used to produce milk products such as cream, butter, etc., goes into Class II or some other lower-priced class. It is not necessary to go into the details of uniform prices, times and methods of payment, etc., to see that in order to determine what a handler owes for milk received from "producers", all of such "producer" or "graded" milk must be classified so that the appropriate class prices may be applied to the quantities in the various classes. It is also obvious that where, as here, a handler has both "graded" and "ungraded" milk, some way must be found to determine classification for the "graded" part of the handler's total milk. The method prescribed by Order 68 is allocation, first classifying all a handler's utilization of milk and then taking out the "ungraded" milk by subtracting quantities of "ungraded" from the various classes, leaving the "graded" milk all classified. Regardless of whatever other methods might have been used, the allocation method is authorized by law. *In re Bauer's Dairies*, 4 A. D. 528, 539 (1945), affirmed as *Beatrice Creamery Company v. Anderson*, 75 F. Supp. 363 (D. Kansas, 1947); *In re Bailey Farm Dairy Co.*, 3 A. D. 715 (1944), affirmed, *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209 (E. D. Mo. 1945), and *Bailey Farm Dairy Co. v. Anderson*, 157 F. (2d) 87 (C. C. A. 8th, 1946).

The system established for classifying by allocation is, in general, as follows. Section 968.5 (a) of the order requires a handler to report for each month receipts of milk (1) from "producers", (2) from the handler's own farm production, (3) from certain other handlers, and (4) "from any other source." Section 968.3 (d) requires the handler to compute the amount of milk in each class by first determining the



total of milk received "from (i) producers, (ii) own farm production, (iii) other handlers, and (iv) other sources." The handler is then to determine the total pounds of milk in each of the three classes. As other source milk is specifically mentioned, petitioner's contention that the order did not apply to its "ungraded" milk in this respect is not well taken. Any possible doubt of this would be removed by what is next required, the subtraction from the totals in each class of receipts from other handlers, "from sources other than producers," etc. When the various subtractions have been made, the "ungraded" milk has been taken out, and the amounts of producer milk in each class have been determined. In other words, the milk received from "producers" by the handler has been classified. Class prices are then applied to the quantities in the different classes, and the amount the handler owes "producers" is ascertained.

Petitioner had not made these computations in its reports for four of the months involved, as it had not reported its "ungraded" receipts and utilization. When the market administrator obtained data concerning the milk not reported, he found greater quantities disposed of in Class I than had been reported. By allocation, "graded" milk went to this available class, with the result that more milk received from "producers" was determined as in Class I. There being thus more "producer" milk in Class I than petitioner had paid for at the Class I price, petitioner was billed for additional payments.

Having ascertained that the order required classification of petitioner's "ungraded" milk, we come now to its classification in Class I instead of Class III. Section 968.3 (b) (1) of the order provides that "Class I milk shall be . . . *all milk not specifically accounted for as Class II milk or Class III milk.*" (Emphasis supplied.) Section 968.5 (d) requires handlers to keep such records and facilities as will enable the market administrator to verify their reported receipts and disposition of all milk. Petitioner's records of disposition of its shipments mentioned in Finding 2, even as they may be considered as supplemented by information subsequently obtained, were not sufficient to support the claimed Class III utilization. *In re Odilon Charest*, 4 A. D. 903 (1945); *In re Willow Farm Products*, 8 A. D. 348 (1949). Such milk was properly classified as Class I by the market administrator.

The market administrator's classification of the shipments here involved as in Class I was authorized by Order No. 68, and he correctly applied valid allocation provisions of the order in classifying and pricing petitioner's milk received from "producers." The market administrator's acts being in accordance with law, petitioner's complaint concerning them should be dismissed.

**ORDER**

The relief requested by petitioner is denied and the petition is dismissed.

Copies hereof shall be served upon petitioner, respondent, and the market administrator of Order No. 68.

(No. 2343)

*In re* Market Agencies at Omaha Union Stock Yards, Omaha, Nebraska. P&S Doc. No. 143. Decided February 9, 1950.

**Continuation of Rates and Charges**

Since the parties are agreed the current temporary rate order of March 21, 1949, is continued in effect, to and including March 31, 1951.

*Mr. John J. Murray* for Livestock Branch, Production and Marketing Administration. *Mr. C. W. Winkler*, of Omaha, Nebraska, for respondents.

*Decision by Thomas J. Flavin, Judicial Officer*

**CONSENT ORDER**

This is a rate proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*).

The respondents are presently operating under a temporary order dated March 21, 1949 (8 A. D. 252), authorizing assessment of the current rates until and including March 31, 1950.

On January 27, 1950, respondents filed a petition requesting that the order of March 21, 1949, be extended for a period of one year beginning April 1, 1950.

On February 1, 1950, the Livestock Branch filed an answer recommending that the petition be granted.

Inasmuch as the parties are agreed the petition is granted and the order of March 21, 1949, is continued in effect to and including March 31, 1951.

The schedule of rates currently in effect was authorized by the order of March 21, 1949. That order was preceded by a notice of petition published in the Federal Register on March 5, 1949 (14 F. R. 1008) and no protest to the action petitioned for was received. This order merely continues the provisions of the current order in effect for an additional period of one year. In view of the foregoing it is found that notice and public procedure are unnecessary.

This order shall become effective on April 1, 1950.

Copies hereof shall be served upon the parties by registered mail or in person.

(No. 2344)

*In re* Market Agencies at St. Louis National Stock Yards. P&S Doc. No. 383. Decided February 9, 1950.

### Continuation of Rates and Charges

Since the parties are agreed the current temporary rate order of March 23, 1949, is continued in effect to and including September 30, 1951.

*Mr. John J. Murray* for Livestock Branch, Production and Marketing Administration. *Mr. W. R. Huitt*, of National Stock Yards, Illinois, for market agencies. *Mr. H. D. Wright*, of National Stock Yards, Illinois, for Producers Live Stock Commission Association. *Mr. S. P. Knowles*, of National Stock Yards, Illinois, for Farmers Live Stock Commission Company.

*Decision by Thomas J. Flavin, Judicial Officer*

### CONSENT ORDER

This is a rate proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*).

The respondents are presently operating under a temporary order dated March 23, 1949 (8 A. D. 254), authorizing assessment of the current rates until and including March 31, 1950.

On February 1, 1950, respondents filed a petition requesting that the current authorization be continued in effect to and including September 30, 1951.

On February 2, 1950, the Livestock Branch filed an answer recommending that the petition be granted.

Inasmuch as the parties are agreed, the petition is granted and the order of March 23, 1949, is continued in effect to and including September 30, 1951, unless modified by further order before that date.

The schedule of rates currently in effect was authorized by the order of March 23, 1949. That order granted a petition filed by respondents on March 17, 1949. A prior petition filed by respondents on November 30, 1948, had requested authority to charge rates higher than those requested in the petition of March 17, 1949, authorized by the current order of March 23, 1949. Notice of this petition of November 30, 1948, was published in the Federal Register on December 17, 1948 (13 F. R. 7805). No interested member of the public protested the action requested. This order merely continues the provisions of the current order, i. e., the order of March 23, 1949, in effect for an additional period of eighteen months. In view of the foregoing, it is found that notice and public procedure are unnecessary in connection with this order.

This order shall become effective on April 1, 1950.

Copies hereof shall be served upon the parties by registered mail or in person.

(No. 2345)

*In re* Sioux City Stock Yards Co. P&S Doc. No. 425. Decided February 9, 1950.

**Continuation of Rates and Charges**

By agreement of the parties the current temporary rate order of September 9, 1948, is continued in effect to and including March 24, 1952.

*Mr. Elmer J. Scott* for Livestock Branch, Production and Marketing Administration. *Mr. Ashley Sellers*, of McFarland and Sellers, Washington, D. C., for respondent.

*Decision by Thomas J. Flavin, Judicial Officer*

**SUPPLEMENTAL ORDER**

This is a rate proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), in which reasonable rates were prescribed for the respondent by an order dated December 13, 1934. Supplemental orders have been entered from time to time and by order dated September 9, 1948, the respondent was authorized to charge the temporary rates and charges therein set forth until March 24, 1950, at which time other temporary rates and charges then in effect were due to expire.

By petition filed on January 27, 1950, the respondent seeks to have the temporary rates and charges now in effect continued in effect until March 24, 1952, unless otherwise extended or modified. The answer of the Production and Marketing Administration recommends that the respondent's petition be granted on the basis of the information contained in respondent's petition, in the attachment thereto, and in respondent's annual and periodic reports filed pursuant to previous orders entered herein.

Inasmuch as the parties are agreed, respondent is authorized to continue to assess the rates and charges now in effect until and including March 24, 1952, subject to further order herein. The conditions set forth in the order of July 3, 1946, with reference to the filing of quarterly reports and the reduction of rates upon the basis of information contained in said reports, shall continue to be in effect.

The schedule of rates and charges currently in effect was authorized by previous orders which were preceded by notices published in the Federal Register and, although opportunity was afforded all interested persons to be heard, no protests were received. This order merely continues the present charges in effect for an additional period. In view of the foregoing, it is found that notice and public procedure on the rule are unnecessary. This order shall become effective on March 24, 1950, and copies hereof shall be served upon the respondent.

(No. 2346)

**Arkansas Valley Sales Company v. Bruce-Jones Live Stock Commission Company.** P&S Doc. No. 1861. Decided February 13, 1950.

**Dismissal—Failure to State Cause of Action**

Where complainant alleged that respondent commission company had refused to pay a draft drawn upon it by one W in payment for livestock purchased from complainant, it is held, that, since complainant does not claim that W purchased the livestock as agent for respondent or that respondent held out W as its agent, the mere allegation that respondent failed to honor a draft drawn upon it by W for livestock purchased by the latter does not state a cause of action under the act and, therefore, the complaint should be dismissed.\*

**Compliance with Limitation Period for Filing of Complaint for Reparation**

Where formal complaint was filed on January 31, 1949, with respect to matters taking place November 12-15, 1948, and an informal complaint was filed prior to January 31, 1949, held, that complaint was timely filed within the 90-day limitation period provided for by the act.\*

**Administrative Determination of Constitutionality of Statute**

Where reparation complaint states a cause of action the Department is not in an appropriate position as an administrative agency to pass upon the constitutionality of the act entrusted to it for administration.\*

**Constitutionality of Act—Right to Jury Trial—Seventh Amendment to Federal Constitution**

Since any reparation award made under the act must be enforced in a court of law, in a suit which “. . . shall proceed in all respects like other suits for damages . . .” respondent is not precluded from a jury trial and the act is not unconstitutional in this respect.\*

*Mr. Wilkie Ham*, of Ham, Johnson & Shinn, Lamar, Colorado, and *Messrs. NeSmith & Irwin*, of Wichita, Kansas, for complainant. *Messrs. Myers & Snerly*, of Chicago, Illinois, for respondent. *Mr. John J. Murray*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**ORDER OF DISMISSAL**

This is a reparation proceeding under Section 309 (a) of the Packers and Stockyards Act, 1921 (7 U. S. C. 181 *et seq.*). Complainant, the Arkansas Valley Sales Company of Lamar, Colorado, filed a complaint on January 31, 1949, alleging that the Bruce-Jones Live Stock Commission Company of Wichita, Kansas, had refused to

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

pay a draft for \$8,127.65 drawn upon it by one Guy Wilson in payment for livestock purchased from complainant. The complaint says:

"Bruce-Jones Livestock Commission Co., of Wichita, Kansas, refused to pay a draft drawn on them for \$8,127.65 by Guy Wilson, whereas they had been honoring all drafts drawn on them by him for several months. We have at no time received word not to accept drafts signed by Guy Wilson. Mr. Guy Wilson informed us that the cattle for which this draft was drawn went to the Bruce-Jones Livestock Commission Co. at Wichita, Kansas."

Respondent filed an answer to the complaint and also a motion to dismiss the complaint together with a supporting brief. There were also filed in the proceeding, pursuant to section 202.40 of the rules of practice (9 CFR 202.40), investigation reports prepared by the Livestock Branch, Production and Marketing Administration, copies of which were served upon the parties. Copies of the respondent's answer and motion to dismiss were served upon complainant. No reply to the motion to dismiss has been received and neither party up to this stage of the proceeding has taken issue with the statements contained in the investigation reports. Presiding Officer John J. Murray on February 3, 1950, certified the motion to dismiss to the Judicial Officer.

Respondent contends that the complaint should be dismissed because it was not filed within ninety days after the occurrence of the acts protested. The formal complaint was filed on January 31, 1949, with respect to matters taking place November 12-15, 1948, and was therefore timely. In addition, an informal complaint was made prior to January 31, 1949, and the making of an informal complaint within the ninety-day period is sufficient.

Respondent also argues that the only possible cause of action stated in the complaint is a common-law action with respect to which respondent is entitled to a trial in a court of law by a jury and that the Seventh Amendment to the Constitution would be violated if there should be a hearing held in this proceeding. If the complaint states a cause of action under the act, we are not in an appropriate position as an administrative agency to pass upon the constitutionality of a law committed to us for administration. However, any reparation award made must be enforced in a court of law in a suit which ". . . shall proceed in all respects like other suits for damages. . . ." Respondent is not precluded from a jury trial and the act is not unconstitutional in this respect. *Southern Ry. Co. v. Eichler et al.*, 56 F. (2d) 1010 (C. C. A. 8th, 1932).

Respondent also argues that the complaint does not allege any violation of the act or the regulations issued thereunder. We would not dismiss a complaint merely for failure to mention a particular part

of the act or regulations if the facts alleged disclose a cause of action under the statute. However, the question remains as to whether a cause of action under the act is set out in the complaint.

The complaint does not claim that Guy Wilson purchased the livestock as agent for the respondent or that respondent held out Guy Wilson as its agent. Other than the allegation that respondent had honored prior drafts over a period of several months, there are no facts set out as a basis (1) for a legal obligation generally upon respondent to pay the draft or (2) for a responsibility upon respondent to do so under the act. It seems apparent that Guy Wilson was a country trader, that he purchased livestock, including the livestock in question, for his own account at various places, and that he consigned some of the livestock purchased to respondent for sale on a commission basis. While respondent did honor prior drafts by Wilson drawn upon it in payment for purchases from complainant, this seems to have been merely a limited extension of credit to Wilson by respondent. It is apparent too that complainant was acquainted with the nature of Wilson's operations and his relationship to respondent. Under the circumstances disclosed, we think that a mere allegation that respondent failed to honor a draft drawn upon it by Wilson for livestock purchased by him does not state a cause of action under the act. Such was the decision of the Secretary in an almost identical situation in P&S Docket No. 1266, *In re Bank Commission Co.* (1940). See also *Davis and Ham Commission Company v. Mt. Vernon Bank*, 133 S. W. (Tex.) 448.

Accordingly, the complaint is dismissed. Complainant, of course, has the opportunity to file a petition for reconsideration of this decision and order within 15 days after service of a copy thereof.

Copies hereof shall be served on the parties by registered mail or in person.

(No. 2347)

*In re St. Joseph Stock Yards Company.* P&S Doc. No. 298. Decided February 16, 1950.

#### **Continuation of Rates and Charges**

Inasmuch as the parties are agreed respondent is authorized to continue to assess the current rates set out in Tariff No. 16, for a period of two years following the effective date of this order.

**Mr. John J. Murray** for Livestock Branch, Production and Marketing Administration. **Mr. Ashley Sellers**, of McFarland and Sellers, Washington, D. C., for respondent.

*Decision by Thomas J. Flavin, Judicial Officer*

**CONSENT ORDER**

This is a rate proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*).

The respondent is now operating under an order dated April 21, 1947 (6 A. D. 534), as modified by orders dated June 10, 1947 (6 A. D. 534), and April 1, 1948 (7 A. D. 281). These orders authorize the assessment of the current rates until and including April 7, 1950.

On February 6, 1950, the respondent filed a petition requesting that the current authorization be continued in effect to and including April 7, 1952.

On February 7, 1950, the Livestock Branch filed an answer recommending that the petition be granted.

Inasmuch as the parties are agreed the respondent is authorized to continue to assess the current rates i. e. rates set out in Tariff No. 16 presently filed with the Livestock Branch for a period of two years following the effective date of this order unless such rates shall be changed by further order before that date.

This order is issued subject to all of the terms and conditions of the stipulation of April 13, 1942, as modified, including the provision with respect to quarterly reports.

The schedule of rates currently in effect was authorized by the orders mentioned above. These orders were issued upon petitions by respondent and answers by the Livestock Branch. Notice of each petition, except the one resulting in the order of June 10, 1947, was published in the Federal Register. No interested party protested the action sought by the petitions. In view of the foregoing, it is found that notice and public procedure are unnecessary in connection with this petition.

This order shall become effective on April 7, 1950.

Copies hereof shall be served upon the parties by registered mail or in person.

(No. 2348)

*In re* Julian Rogers. P&S Doc. No. 1848. Decided February 21, 1950.

**Suspension of Registration Held in Abeyance**

Where the order of inquiry charged respondent with wilful violations of various provisions of the act and respondent signed a stipulation admitting the allegations of fact alleged in the order of inquiry and consenting to a cease and desist order and to a suspension of his registration for a period of 30 days, providing such suspension be held in abeyance, which was recommended by the Livestock Branch, the respondent's registration is suspended for 30



days, which suspension is held in abeyance and shall not become effective unless respondent, within two years from the date of the order, is again found, after opportunity for a hearing, to have violated the act and the regulations thereunder.\*

#### Cease and Desist—Violations of Act

Respondent is ordered to cease and desist from restricting or eliminating competition at stockyards posted under the act by coercion, intimidation or unfair and discriminatory agreements with livestock buyers or by any other unlawful means and from increasing the weights shown on scale tickets at the time of purchase when the livestock is sold, purportedly on the basis of scale ticket weights.\*

*Mr. Jerome S. Ducrest* for Livestock Branch, Production and Marketing Administration. *Mr. Julian Rogers*, of Lexington, Kentucky, *pro se*.

*Decision by Thomas J. Flavin, Judicial Officer*

#### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921 (7 U. S. C. 181 *et seq.*). Respondent is registered under the act as a dealer engaged in the business of buying and selling livestock for his own account at a number of stockyards in Kentucky. The Order of Inquiry and Notice of Hearing issued by the Director, Livestock Branch, Production and Marketing Administration, charges that respondent wilfully restricted or eliminated competition at various posted stockyards in Kentucky through coercion, intimidation or unfair and discriminatory agreements with livestock buyers and that with respect to livestock purchased at several posted stockyards, respondent sold the livestock purportedly on the basis of weights shown on scale tickets issued by the stockyard when in fact the respondent, without reweighing the livestock, billed the purchasers on the basis of increased weights, retaining copies in his records of the false billings.

The respondent filed an answer consisting mainly of general denials of the charges in the complaint. Subsequently respondent submitted a stipulation consenting to the issuance, without a hearing, of an order (1) requiring him to cease and desist from continuing the unlawful, unfair, unjustly discriminatory and deceptive practices complained of in the Order of Inquiry and (2) suspending his registration for 30 days, such suspension to be held in abeyance and not become effective unless, within two years from the date of the order in this proceeding, respondent is again found, after opportunity for hearing, to have violated the act or the regulations under the act.

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

Complainant filed a statement recommending that the consent order be adopted. The statement points out that respondent has been an important outlet for the livestock auction markets in Kentucky buying about \$350,000 worth of livestock weekly, that an effective suspension of respondent's registration would result in a condition temporarily at least whereby there would not be sufficient buyer outlets for the average volume of livestock received at these markets and that livestock producers would thereby be adversely affected by a lack of buying competition. The statement also recites that many of the packers to whom respondent has sold livestock are financially weak, that well over a million dollars is due respondent from packers and that a formal hearing or an effective suspension at this time might jeopardize the payments for livestock by respondent to the auction market companies and their producer-patrons.

#### FINDINGS OF FACT

1. The respondent, Julian Rogers, is registered with the Secretary of Agriculture as a dealer engaged in the buying and selling of livestock for his own account at the stockyards mentioned below which were posted stockyards under the act.

2. The respondent wilfully restricted or eliminated competition at posted stockyards in Kentucky through coercion, intimidation or unfair and discriminatory agreements with livestock buyers in that:

(a) In the spring of 1947, the respondent made an agreement with Nobel Ogden, a hog buyer for the Fisher Packing Company of Louisville, Kentucky, to eliminate competitive bidding between themselves at various posted stockyards in Kentucky.

(b) In January 1948, the respondent, by refraining for a limited period of time from bidding on livestock at the Clay Gentry Stockyards Company, Inc., Lexington, Kentucky, a posted stockyard, and threatening to withdraw his livestock buying permanently from such stockyard and to "close up the stockyard" if the stockyard owners accepted and filled any further purchase orders, compelled James M. Sharp, principal owner of said stockyard to agree not to fill orders for prospective purchasers of livestock at the stockyard.

(c) In January 1948, the respondent intimidated the officials of the Pine Mountain Packing Company of Blackey, Kentucky, and caused that company to discontinue purchasing livestock at the Clay Gentry Stockyards Company, Inc., Lexington, Kentucky.

(d) In January 1948, the respondent made an agreement with Lyle Sims whereby the respondent agreed to permit Lyle Sims to buy a limited number of hogs at certain posted stockyards in Kentucky without competition from the respondent provided Sims refrained

from buying livestock at the Lexington and Paris, Kentucky, stockyards, both of which were posted stockyards.

(e) At divers other times during 1947 and 1948, the respondent through coercion, intimidation or unfair and discriminatory agreements with livestock buyers restricted or eliminated competitive buying at posted stockyards in the State of Kentucky.

3. On a number of occasions in 1947 and 1948, respondent sold livestock which he had purchased at the Cynthiana Live Stock Sales Company Yards, Cynthiana, Kentucky, Farmers Stockyards, Flemingsburg, Kentucky, Garrard County Stockyards Company, Lancaster, Kentucky, Maysville Stock Yards, Maysville, Kentucky, Winchester Stock Yards, Winchester, Kentucky, and Madison Sales Company Stockyards, Richmond, Kentucky, purportedly on the basis of weights shown on scale tickets issued by the stockyard when, in fact, respondent, without reweighing, billed the purchasers on the basis of higher weights and retained copies of the false billings in his records.

### CONCLUSION

The charges admitted by respondent are serious and ordinarily would warrant an effective suspension for a substantial period of time. However, for the reasons given in complainant's statement, described above under "Preliminary Statement," the consent order proposed is adopted.

### ORDER

Respondent shall cease and desist forthwith (1) from restricting or eliminating competition at stockyards posted under the act by coercion, intimidation, unfair or discriminatory agreements with livestock buyers or by any other unlawful means, and (2) from increasing the weights of livestock over the weights shown on scale tickets at the time of purchase when the livestock is sold purportedly on the basis of scale ticket weights.

The respondent's registration is suspended for 30 days which shall be held in abeyance and not become effective unless respondent, within two years from the date of this order, is again found, after opportunity for hearing, to have violated the act or the regulations thereunder.

The respondent shall keep such books and records as will fully and correctly disclose all transactions involved in his business as a registrant.

(No. 2349)

*In re* St. Paul Union Stockyards Company. P&S Doc. No. 1211.  
Decided February 24, 1950.

### Continuation of Rates and Charges

Inasmuch as the parties are agreed respondent is authorized to continue to assess the current rates set out in the order of April 1, 1948, as modified by the order of March 25, 1949, for a period of two years, following the effective date of this order.

*Mr. John J. Murray* for Livestock Branch, Production and Marketing Administration. *Mr. Ashley Sellers*, of McFarland and Sellers, Washington, D. C., for respondent.

*Decision by Thomas J. Flavin, Judicial Officer*

### ORDER

This is a rate proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*).

The respondent is now operating under an order dated April 1, 1948 (7 A. D. 282) as modified by an order dated March 25, 1949 (8 A. D. 256), providing for assessment of certain temporary rates for stockyard services until and including April 6, 1950.

On February 15, 1950, respondent filed a petition requesting that the current schedule of rates be continued in effect until April 7, 1952, unless modified or extended by further order prior to that date.

On February 16, 1950, the Livestock Branch filed an answer recommending that the petition be granted.

Inasmuch as the parties are agreed the petition is granted and the order of April 1, 1948, as modified by the order of March 25, 1949, is continued in effect to and including April 6, 1952, unless changed by further order before that date.

The orders of April 1, 1948 and March 25, 1949, were issued upon petitions by the respondent, answers by the Livestock Branch and opportunities for interested parties to be heard upon the matters involved. No interested party indicated any opposition or desire to be heard in the matters. This order merely continues the current rates in effect for a period of two years. In view of these circumstances it is found that notice and public procedure are unnecessary.

This order shall become effective on April 7, 1950.

Copies hereof shall be served upon the parties by registered mail or in person.

(No. 2350)

*In re* Market Agencies at the Sioux City Stock Yards, Sioux City, Iowa. P&S Doc. No. 308. Decided February 27, 1950.

**Motion to Extend Period Allowed to Rehear, Reargue and Reconsider Prior Decision Granted**

Respondent's motion for the extension until April 15, 1950, of the period allowed to rehear, to reargue and to reconsider, etc., the decision and order entered January 31, 1950, granted, which extension of time shall be available also for the Livestock Branch, Production and Marketing Administration, and the prior decision and order entered January 31, 1950, shall remain in effect pending final disposition of any such petition to be filed by either party.

*Mr. Elmer J. Scott* for Livestock Branch, Production and Marketing Administration. *Mr. Ashley Sellers*, of McFarland and Sellers, Washington, D. C., for respondents.

*Decision by Thomas J. Flavin, Judicial Officer*

**EXTENSION OF TIME**

In this rate proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), respondents filed on February 9, 1950, a motion for the extension until April 15, 1950, of the period allowed to rehear, to reargue, to reconsider, etc., the decision and order entered January 31, 1950. On February 21, 1950, the Livestock Branch, Production and Marketing Administration, filed an answer to the motion stating that it has no objections to the granting of the motion but recommends that the extension of time be available also for the Branch.

Accordingly, the time for filing such petitions is extended for both sides in the proceeding to April 15, 1950. In the meantime, the decision and order of January 31, 1950, shall become effective as ordered and shall remain in effect pending final disposition of any such petition filed by either party on or before April 15, 1950, or, if no such petition is filed by either party on or before such date, the decision and order of January 31, 1950, shall become final.

(No. 2351)

*In re* H. B. Mattingly and Loren F. Sutton, partners, d. b. a. Mattingly and Sutton Live Stock Commission Company. P&S Doc. No. 1866. Decided February 28, 1950.

### Cease and Desist—Violation of Act

Respondent registered as a market agency engaged in the business of buying and selling livestock on a commission basis is ordered to cease and desist from misrepresenting to buyers of livestock the ownership of livestock sold.\*

*Mr. Jerome S. Ducrest* for complainant. *Mr. H. B. Mattingly*, of St. Louis, Missouri, for respondents.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*). An Order of Inquiry and Notice of Hearing by the Director, Livestock Branch, Production and Marketing Administration, charged respondents with misrepresenting to a packer buyer the ownership of livestock which had been planted with respondents for sale by a livestock buyer for the packing company. Respondents admitted the facts alleged, waiving a hearing, and consented to the issuance of a cease and desist order. The complainant agreed that a cease and desist order would be a sufficient sanction. The recommendation of complainant is adopted herein.

### FINDINGS OF FACT

1. The Mississippi Valley Stockyards, St. Louis, Missouri, hereinafter referred to as the stockyard, was at all times mentioned herein a posted stockyard under the provisions of the act.

2. The respondents at the times of the transactions hereinafter referred to were registered with the Secretary of Agriculture as a market agency engaged in the business of buying and selling livestock on a commission basis at the stockyard.

3. On a number of occasions in 1948 and 1949 the respondents, in connection with the sale of livestock to the Royal Packing Company, St. Louis, Missouri, knowingly concealed the fact that Turner and Sutton, a registered dealer, owned the livestock by misrepresenting to the Royal Packing Company that persons other than Turner and Sutton were the owners. The respondents knew that Turner and Sutton was a livestock buyer for the Royal Packing Company.

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

### CONCLUSIONS

By reason of the facts set out in Finding of Fact 3, the respondents have violated sections 307, 312 (a) and 402 of act.

### ORDER

Effective forthwith, respondents shall cease and desist from misrepresenting to buyers of livestock the ownership of livestock sold.

(No. 2352)

*In re* Mississippi Valley Livestock Commission Company. P&S Doc. No. 1866. Decided February 28, 1950.

(Same as 9 A. D. 213)

*Mr. Jerome S. Ducrest* for complainant. *Mr. John C. Kappel, Jr.*, of St. Louis, Missouri, for respondent.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*). An Order of Inquiry and Notice of Hearing by the Director, Livestock Branch, Production and Marketing Administration, charged respondent with misrepresenting to a packer buyer on a number of occasions in 1948 the ownership of livestock which had been planted with respondent for sale by a livestock buyer for the packer. An answer was filed by R. C. Calif stating that the partnership comprising the Mississippi Valley Livestock Commission Company at the time of the actions alleged was dissolved on December 31, 1948, and that three of the four partners, including R. C. Calif, organized on January 1, 1949, the Mississippi Valley Livestock Commission Company. The answer admits the facts alleged but denies any wilful intent to deceive or defraud the packer buyer. Respondent consents to the issuance of a cease and desist order, waiving a hearing, and the complainant recommends adoption of such a consent order.

### FINDINGS OF FACT

1. The Mississippi Valley Stockyards, St. Louis, Missouri, hereinafter referred to as the stockyard, was at all times mentioned herein a posted stockyard under the provisions of the act.

2. The respondent is registered with the Secretary of Agriculture as a market agency engaged in the business of buying and selling livestock on a commission basis at the stockyard and at the times of the transactions hereinafter referred to was so registered.

3. On a number of occasions in 1948, the respondent, in connection with sales on a commission basis at the stockyard to the Sieloff Packing Company, St. Louis, Missouri, of livestock planted with respondent for sale, misrepresented to the packer the ownership of the livestock and knowingly concealed from such packer the fact that Arthur H. Schroeder, a livestock buyer for the packer, was the owner of the livestock.

### CONCLUSIONS

By reason of the facts alleged in Finding of Fact 3, the respondent has wilfully violated sections 307, 312 (a) and 402 of the act.

### ORDER

Effective forthwith, respondent shall cease and desist from misrepresenting to buyers of livestock the ownership of livestock sold.

(No. 2353)

*In re* Producers Livestock Marketing Association. P&S Doc. No. 1852. Decided February 28, 1950.

(Same as 9 A. D. 213)

*Mr. Jerome S. Ducrest* for complainant. *Mr. Harold G. Baker*, of *Baker, Lese-mann, Kagy & Wagner*, of East St. Louis, Illinois, for respondent.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*). An Order of Inquiry and Notice of Hearing by the Director, Livestock Branch, Production and Marketing Administration, charged respondent with misrepresenting to a packer buyer on a number of occasions in 1948 the ownership of livestock which had been planted with respondent for sale by a livestock buyer for the packer. An answer was filed by respondent admitting the facts alleged but stating that respondent stopped the activities complained of when it discovered that its employees were cooperating with the buyer for the packer. Respondent waived a hearing and consented to the issuance of a cease and desist order. The complainant recommends adoption of such a consent order.

### FINDINGS OF FACT

1. The Mississippi Valley Stockyards, St. Louis, Missouri, hereinafter referred to as the stockyard, was at all times mentioned herein a posted stockyard under the provisions of the act.



2. The respondent is registered with the Secretary of Agriculture as a market agency engaged in the business of buying and selling livestock on a commission basis at the stockyard and at the times of the transactions hereinafter referred to was so registered. Prior to September 23, 1948, the respondent was registered in the name of Producers Livestock Commission Company.

3. On a number of occasions in 1948, the respondent, in connection with sales on a commission basis at the stockyard to the Sieloff Packing Company, St. Louis, Missouri, of livestock planted with respondent for sale, misrepresented to the packer the ownership of the livestock and knowingly concealed from such packer the fact that Arthur H. Schroeder, a livestock buyer for the packer, was the owner of the livestock.

### CONCLUSIONS

By reason of the facts alleged in Finding of Fact 3, the respondent has wilfully violated sections 307, 312 (a) and 402 of the act.

### ORDER

Effective forthwith, respondent shall cease and desist from misrepresenting to buyers of livestock the ownership of livestock sold.

(No. 2354)

Ernest E. Fadler Company *v.* Hill Produce Company. PACA Doc. No. 5052. Decided February 1, 1950.

### Failure to Pay Balance of Purchase Price—Failure to Establish Breach of Warranty—Evidence—Too General and Indefinite

Where complainant-seller contracted through its agent to sell to respondent-buyer a "good car of cabbage", and upon arrival of the cabbage at destination respondent and one of his employees made a doorway inspection after which respondent claimed the cabbage was in an unsatisfactory condition because of decay and yellow leaves, and subsequently removed and sold 194 bags of cabbage, abandoning 295 bags to the railroad, but at no time requested or obtained an official or independent inspection, it is held, in an action by complainant to recover the balance of the purchase price of the cabbage, that the evidence of bad condition is too general and too indefinite to support a finding that the cabbage did not meet contract requirements, and complainant should be awarded reparation with interest.\*

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

**Failure to Give Notice of Rejection of Commodity Within 24 Hours as Constituting Acceptance—Partial Unloading of Car Tantamount to Acceptance of Shipment**

Where respondent contended that he rejected the shipment within a reasonable time, and the evidence shows that respondent was given notice of arrival at 6:30 a. m. on March 26, but did not contact complainant until March 29, at which time respondent first gave actual notice of rejection, it is held, that respondent accepted the shipment by failing to give notice within 24 hours after receipt of notice of arrival, and that, where respondent's own testimony was to the effect that some 50 bags of cabbage were unloaded on March 26 or 27, such unloading of a part of the cabbage amounted to an acceptance of the shipment.\*

*Mr. Warren S. Earhart*, of Kansas City, Missouri, for complainant. *Mr. Everett Prosser*, of Carbondale, Illinois, for respondent. *Mr. Gilbert A. Horn*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Informal complaint was received by the Regulatory Division, Fruit and Vegetable Branch, on March 20, 1948, and a formal complaint was filed September 16, 1948. A copy of the formal complaint and a copy of the report of investigation were served upon respondent by registered mail on October 25, 1948. A copy of the report of investigation was also served upon complainant by registered mail on October 25, 1948. Respondent's answer was filed on November 8, 1948.

Complainant alleges that respondent purchased a carload of cabbage from complainant through D. O. Williams, a broker in St. Louis, Missouri, for the total price of \$625, plus \$60 for top ice; that the sale was made on the basis of an inspection at St. Louis by Williams; that the shipment was diverted to Carbondale, Illinois; that upon arrival respondent unloaded and retained part of the cabbage, but rejected the balance without reasonable cause; and that respondent paid complainant the sum of \$94.71 on the shipment, but has failed and refused to pay the balance of \$590.29.

Respondent alleges that the sale was made subject to respondent's right to inspect and accept or reject the shipment upon delivery to respondent at Carbondale, Illinois. Respondent further alleges that, upon arrival of the shipment, respondent found the cabbage to be in

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

an unsatisfactory condition and notified complainant of his refusal to accept the produce as delivered to him; that complainant authorized respondent to handle the car for complainant's account; that respondent sold a portion of the shipment and remitted \$94.71 to complainant; and that the balance of the cabbage was damaged beyond possibility of salvage and was rejected to the railroad.

An oral hearing was held at Carbondale, Illinois, on April 21, 1949. The depositions of two witnesses were received in evidence on behalf of complainant. Respondent was represented by counsel and introduced the oral testimony of two witnesses.

### FINDINGS OF FACT

1. Complainant, Ernest E. Fadler Company, is a corporation whose principal office is at 311 Produce Exchange Building, Kansas City, Missouri.

2. Respondent is an individual, S. G. Hill, doing business as Hill Produce Company, whose address is Carbondale, Illinois. At the time of the transaction complained of herein, respondent was licensed under the act.

3. On or about March 24, 1948, respondent entered into an oral contract with complainant's agent, D. O. Williams, at St. Louis, Missouri, for the purchase of one carload of good cabbage, containing 500 sacks, at \$1.25 per sack, f. o. b. shipping point, plus \$60 for top ice. Respondent requested complainant's agent to inspect the carload of cabbage and if he found the cabbage to be in good condition to ship it to respondent's place of business at Carbondale, Illinois. Complainant's agent did not disclose the name of his principal at the time of sale.

4. The cabbage in question was contained in car ART 23385 which had been shipped from San Benito, Texas, on March 15, 1948. At the time the cabbage was sold to respondent, the car was standing on track in St. Louis, Missouri. Complainant's agent inspected the shipment and was of the opinion it was in good condition.

5. On March 25, 1948, the shipment arrived at Carbondale, Illinois. The following morning at 6:30, the carrier gave respondent notice of arrival. Respondent and one of his employees inspected the cabbage in the doorway. About 50 sacks of cabbage were unloaded by respondent on or about March 26 or 27.

6. On March 26, 1948, a Friday, respondent attempted to call complainant's agent at St. Louis by telephone. He was unable to reach him until shortly before noon the next day. Respondent advised the agent of "the unsatisfactory condition" of the cabbage and stated that

unless a suitable allowance was made, the shipment would be rejected. At that time, the agent told respondent the name of the seller.

7. On March 29, 1948, respondent called complainant by telephone and requested an allowance on the shipment. Complainant offered an allowance of 10 cents per sack, but respondent refused this offer. Respondent advised complainant that the car would be handled for complainant's account. Complainant did not agree to this arrangement.

8. Respondent removed a total of 205 sacks of cabbage from the car. The remaining 295 sacks were left in the car for disposition by the railroad. Respondent has remitted only \$94.71 to complainant.

9. Formal complaint was filed September 16, 1948, and within 9 months after the accrual of the alleged cause of action.

### CONCLUSIONS

Respondent was at St. Louis on March 24, 1948, at the time this sale was negotiated. D. O. Williams had been authorized by the complainant to sell the cabbage in car ART 23385. According to the testimony, respondent met Williams on the street and asked Williams whether he had a car of cabbage to sell. Williams responded that he had a car of Texas cabbage that looked good. Respondent told Williams that he did not have time to go to the track to inspect the car, but instructed Williams to do so and, if it looked good, to send the car to respondent at Carbondale, Illinois. The price agreed upon was \$1.25 per sack f. o. b. shipping point. Williams informed respondent that he was acting only as agent but he did not state the name of his principal, the complainant.

Complainant contends that since respondent was present at St. Louis, he had an opportunity to inspect the car which was tantamount to an actual inspection thereof, and that, accordingly, this should be considered a sale after inspection by respondent, thereby eliminating implied warranties. Respondent was under no obligation to go to the tracks to inspect the cabbage. He chose to rely on Williams' representations regarding the cabbage. In these circumstances, this cannot be considered a sale after inspection by respondent.

Complainant contends further that respondent constituted Williams his agent to inspect the cabbage, and that respondent is bound by Williams' inspection and approval of the shipment. The facts in the case do not bear out this contention. Respondent did not agree to be bound by Williams' inspection. The import of respondent's request was that Williams should examine the shipment carefully to make certain that his representation that it was a "good car of cabbage"

was accurate before shipping it to respondent. It is concluded that this was a sale by description.

Respondent contends that the shipment, upon arrival in Carbondale on March 26, did not meet contract requirements in that it was not a "good" carload of cabbage. Respondent and one of his employees testified that they inspected the shipment upon arrival. The employee, Ira G. McLaughlin, said:

"On breaking the seal and opening the doors, I noticed a terrific stench, an odor, which to me designated rotten cabbage and on closer examination I noticed quite a lot of yellow leaves on the sacks around the door. The cabbage, of course, was piled too high to permit me to get into the car being covered with top ice and I could not crawl over it."

Respondent said:

"Well, the car was smelly and when a car of cabbage is smelly, it's bad, and it had quite a little decay and the outside leaves were yellow."

Respondent further testified that he assisted in determining which bags of cabbage would be unloaded and which left in the car, and that those bags left in the car contained "deteriorated or unsaleable" cabbage. A notation on the delivery receipt which the railroad gave respondent reads as follows: "295 bags salvaged by ICRR—showed decay and yellow at inspection 3/29/48, H. E. Goetz, Agent."

The shipment was inspected at St. Louis, Missouri, on March 23, 1948, by the Western Weighing and Inspection Bureau. The report of this inspection states, in part:

"Round type green cabbage no brand or marks visible packed full small to mostly medium size clean well headed well to close trimmed and green to pale green color.

"Firm fresh no decay or freezing injury found.

"Inspection restricted to exposed sacks in doorway account high loading and body ice."

No official or independent inspection at destination was requested or obtained by respondent. Neither testimony of respondent and his employee, nor the notation on the railroad company's delivery receipt, give any clue concerning the percentage of decay or the extent of damage from yellow leaves. Since the contract was for "good" cabbage, something less than perfect cabbage would meet contract requirements. In other words, there could have been some decay and some yellow leaves and the cabbage could still have been "good." The evidence of bad condition is too general and too indefinite to support a finding that the cabbage did not meet contract requirements.

Although respondent contends that he rejected the shipment within a reasonable time, the evidence is to the contrary. The car arrived at Carbondale on March 25 and notice of arrival was given by the

carrier to respondent at 6:30 a. m. on March 26. Respondent states that he attempted to call Williams on the 26th but did not actually talk to him until about noon on Saturday, the 27th. Respondent does not claim that he gave notice of rejection to Williams; instead, he says that he told Williams he would reject unless he could get a satisfactory allowance. On Monday, March 29th, respondent talked to J. F. Wood, an employee of complainant, by telephone. It was in this conversation, if at all, that respondent first gave notice of rejection. But this was the fourth day after receipt of notice of arrival. Respondent accepted the shipment by failing to give notice of rejection within 24 hours after receipt of notice of arrival. See subsections (r) and (s) of section 46.2 of the regulations (7 CFR 46.2 (r) and (s)). Furthermore, according to respondent's own testimony, some 50 bags of the cabbage were unloaded on March 26 or 27. Such unloading of a part of the cabbage amounted to an acceptance of the shipment.

Respondent alleges, in effect, that a new contract was made on March 29th, whereby respondent was to handle the cabbage for complainant's account. The record shows that respondent remitted \$94.71 to complainant on April 10, 1948, and in that connection submitted a "report" on the disposition of the carload. The \$94.71 figure was computed by taking 194 bags (the number claimed to have been salable out of the 205 bags removed from the car) at a price of \$1.25 per bag, \$232.50, plus freight and top ice on 194 bags, \$126.22, less freight on the entire shipment, \$264.06. It thus appears that respondent remitted on the basis of the original contract price of \$1.25 per bag, f. o. b., and not on the basis of actual sales, as he would have been obligated to do if the original contract had been supplanted by the alleged consignment contract. Complainant's employee, Wood, denies that there was a new contract. Respondent testified that he offered to handle the cabbage for complainant's account but did not state definitely that this offer was accepted. It is concluded that complainant did not accept respondent's offer to handle the shipment for complainant's account, and that no new agreement for the handling of the shipment on a consignment basis ever became effective.

To summarize, since respondent accepted the shipment of cabbage and has failed to prove that complainant breached the contract in any respect, or that a new contract was made, respondent is liable for the full contract price of \$685, less \$94.71 which has been paid. Respondent's failure to pay the balance of \$590.29 is in violation of section 2 of the act. Reparation in the amount of \$590.29, with interest, should be awarded to complainant and the facts should be published.

**ORDER**

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$590.29, with interest thereon at the rate of 5 percent per annum from April 1, 1948, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2355)

The Schuman Company *v.* J. E. Nelson & Sons. PACA Doc. No. 5075.  
Decided February 1, 1950.

**Unlawful Rejection—Waiver of Claim for Damages**

Where complainant sold a carload of lettuce to respondent, f. o. b. acceptance final, to be billed "open" to respondent, and respondent rejected the shipment because it was billed "advise" rather than "open", held, respondent is liable to complainant for the purchase price and by rejection of the produce respondent waived any claim for damages which it might otherwise have against the seller.\*

**Breach of Contract No Defense in Purchase on F. O. B. Acceptance Final Basis**

Where respondent purchased a car of lettuce on an f. o. b. acceptance final basis, but rejected the shipment because complainant billed the car "advise" rather than "open", as required by the contract, complainant's breach is not a defense and respondent is liable for the purchase price.\*

**Waiver of Statute of Frauds**

Where respondent relied upon the defense of the statute of frauds for the first time in the proceeding in his brief filed after the close of the hearing, held, respondent waived the benefit of this defense.\*

**Evidence—Terms of Contract of Purchase and Sale**

Evidence held to show that the sale was made on an f. o. b. acceptance final basis with shipment to be billed "open" rather than "advise" to respondent.\*

*Mr. R. W. Gudgeon*, of Chicago, Illinois, for complainant. *Mr. James W. Nelson*, of Altoona, Pennsylvania, for respondent. *Mr. James A. O'Donnell*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930 (7 U. S. C. 1946 ed. 499a *et seq.*). Informal complaint was made on August 24, 1948, and a formal complaint was

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

filed on October 20, 1948. A copy of the formal complaint, together with a copy of the report of investigation, was served upon respondent by registered mail on January 5, 1949. A copy of the report of investigation was served in like manner upon complainant on January 6, 1949. Copies of the supplemental report of investigation were served by registered mail upon complainant and respondent, respectively, on May 23, 1949, and May 21, 1949.

It is alleged in the formal complaint that on August 20, 1948, complainant sold to respondent 312 crates of Gold Star Brand lettuce, contained in car MDT 5743, which had been shipped from Salinas, California, on August 13, 1948, at an agreed price of \$2.10 per crate, f. o. b. acceptance final, plus \$60 top ice, plus all retop icing. It is also alleged that the car was to be billed "advise" by complainant to respondent; that complainant diverted the car to Johnstown, Pennsylvania, on August 20, 1948, on instructions from respondent; that respondent rejected the shipment, whereupon complainant diverted the car to New York City where it was abandoned to the carrier; and that no part of the purchase price has been paid.

In its answer, filed January 21, 1949, respondent makes no reference to the term "acceptance final" but otherwise admits the existence of the contract and all of its provisions as stated by complainant, except the provision regarding the mode of billing. Respondent alleges that complainant agreed to divert the car of lettuce "open" billing to respondent at Johnstown, Pennsylvania. Respondent also alleges that it refused to accept the shipment of lettuce because of complainant's failure and refusal to divert car MDT 5743 on "open" billing as agreed to by the parties.

A hearing was held at Altoona, Pennsylvania, on June 29, 1949. No one appeared for complainant, but, upon complainant's written request, there was received in evidence the complaint with attached exhibits and the deposition of Sidney Lipsig, assistant to complainant's sales manager, taken at Chicago, Illinois, on May 11, 1949. Respondent was represented by counsel. James E. Nelson and Virginia Stewart testified for the respondent. Both parties filed briefs.

#### FINDINGS OF FACT

1. Complainant, The Schuman Company, is a corporation whose post office address is 216 South Water Market, Chicago, Illinois.

2. Respondent is a partnership composed of James E. Nelson, James W. Nelson, and Donald G. Nelson, doing business as J. E. Nelson & Sons, with its principal place of business at 1102 Eleventh Street, Altoona, Pennsylvania. At the time of the transaction involved herein, respondent was licensed under the act.



3. On or about August 20, 1948, in the course of interstate commerce, the parties entered into an agreement for the sale by complainant to respondent of 312 crates of Gold Star Brand lettuce contained in car MDT 5743, at an agreed price of \$2.10 per crate, plus \$60 top ice, plus retop icing, or for a total price of \$715.20, f. o. b. acceptance final. The contract called for the shipment to be billed "open" to respondent at Johnstown, Pennsylvania.

4. On August 20, 1948, complainant ordered the shipment, then in transit, diverted to Johnstown, Pennsylvania, and to be billed to itself "advise" respondent. On August 21, 1948, which was two days prior to arrival of the lettuce at destination, respondent rejected the shipment to complainant.

5. On August 26, 1948, complainant diverted the shipment to the Allison Produce Company at New York, New York. Following inspection of the produce at New York City by the McCabe Inspection Service on August 31, and September 1, 1948, the carload of lettuce was abandoned to the carrier. Complainant has received no part of the purchase price.

6. Net proceeds of \$56.76 were realized by the carrier upon resale of the carload of lettuce. This amount is being held by the carrier.

7. The formal complaint was filed October 20, 1948, which was within 9 months after the cause of action accrued.

### CONCLUSIONS

The primary question herein is whether there was a meeting of the minds of the parties with respect to the transaction in question and, if so, what terms were agreed upon. The evidence is conflicting. Complainant's deposition witness, Sidney Lipsig, testified that at the time he sold the carload of lettuce to respondent's J. E. Nelson, the latter inquired if it would be possible for complainant to bill the car "open" to respondent at Johnstown, Pennsylvania, and that Nelson was advised by Lipsig that he had no authority to make any such arrangement but that he would take it up with complainant's Credit Department and if that department approved, the car would be billed "open;" otherwise the car would have to be billed "advise." It was testified that respondent thereupon requested Lipsig to do the best he could. Lipsig testified that the Credit Department refused to permit "open" billing of the car and that he therefore confirmed the sale to respondent on the basis of the car being billed "advise."

Respondent's James E. Nelson testified that he offered to purchase the lettuce rolling in car MDT 5743 provided that it would be billed "open" to Johnstown. According to Nelson, the purpose of the "open" billing was to permit respondent's buyer to inspect the car, which was

to be sold solid by respondent as a rolling car or upon arrival at destination. The most significant part of Nelson's testimony is to the effect that Lipsig agreed unequivocally to bill the shipment "open." Nelson also testified that upon receipt of complainant's wire confirming the sale he sent a telegram to complainant taking exception to the provision "all cars rolling advise." Mr. Nelson's testimony with respect to the manner in which car MDT 5743 was to be billed was corroborated by the testimony of his private secretary, who stated that in checking complainant's wire of confirmation she noticed that the phrase "all cars rolling advise" was not in conformance with the parties' telephone conversation, that she underscored the quoted words so as to be sure Mr. Nelson saw them and that, at Mr. Nelson's direction, she immediately sent a wire to complainant taking exception to its failure to bill the car "open" to Johnstown.

In its brief, for the first time in the proceeding, respondent took the position that there was no meeting of the minds of the parties. However, upon consideration of the entire record, it is concluded that the weight of the evidence supports respondent's testimony and other proof that the parties agreed upon a sale of the lettuce in car MDT 5743, to be billed "open" to Johnstown, Pennsylvania. It is undisputed that the terms were f. o. b. acceptance final. It follows that there existed a binding contract between the parties entered into on an f. o. b. acceptance final basis, and requiring complainant to bill the shipment "open."

It is well settled that the term "f. o. b. acceptance final" in a contract means that the buyer not only surrenders his right of rejection but also waives, in the event that he does reject, any claim for damages which he might otherwise have had against the seller. *L. Gillarde & Co. v. Martinelli & Co., Inc.*, 168 F. (2d) 276, amended 169 F. (2d) 60, cert. den. 335 U. S. 885, 7 A. D. 421, 7 A. D. 595; *LeRoy Dyal Co., Inc. v. Charles R. Allen*, 161 F. (2d) 152, 6 A. D. 490. Under the circumstances, the fact the shipment was billed "advise" rather than "open" is not available to respondent as a defense.

After respondent's rejection, complainant attempted to resell the shipment. Despite the fact the car was eventually abandoned to the carrier, it is not suggested that complainant failed to exercise due diligence in its efforts to make an advantageous disposition. The carrier is presently holding net proceeds of \$56.76, realized from its sale of the lettuce, subject to claim. Since complainant is entitled to recover the full contract purchase price from respondent, it follows that respondent should receive the funds being held by the carrier.

In his brief respondent's attorney relies upon the defense of the Statute of Frauds. This was the first mention made by respondent

of such defense. It was not referred to in respondent's answer or at the hearing. The holding in *M. Lapidus and Sons v. A. B. Friedman and Company* 8 A. D. 68 and 442 is controlling on this point. It was there stated that "To permit respondent to advance the defense of the statute of frauds in this case for the first time after the close of the hearing and by brief would be to deprive complainant of an opportunity to offer evidence in rebuttal or even to argue the issue. Further, this would be contrary to the concept of section 47.8 of our rules which contemplates that the Presiding Officer, as well as the opposing party, shall be informed of the precise nature of respondent's defense and of the issues to be tried before the commencement of the hearing." It is concluded, therefore, that having failed to plead the Statute of Frauds affirmatively respondent waived the benefit of this defense.

In conclusion, respondent's rejection was without reasonable cause and in violation of section 2 of the act. Reparation should be awarded complainant for the full contract purchase price amounting to \$715.20, with interest, and the facts should be published.

#### ORDER

Within 30 days from the date of this order, respondent shall pay to complainant as reparation \$715.20, with interest thereon at the rate of 5 percent per annum from September 1, 1948, until paid.

The facts set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2356)

Joe Belson *v.* Jack Kerzner. PACA Doc. No. 4819. Decided February 10, 1950.

#### Denial of Petition for Reconsideration

Where petition for reconsideration contends that the findings and conclusions of order are contrary to the facts and law, held, that the evidence referred to in the petition was considered and discussed in the prior decision and that the order is supported by the facts and law, and, therefore, the petition is denied.

#### Evidence—Failure to Prove Market Value of Produce Received

Where respondent buyer resold produce, which was slightly in excess of the tolerance permitted for the grade purchased, 8 days after arrival and for an amount far below the market value of the grade purchased, and respondent claims that it is entitled to deduct the amount received from the purchase price, held, that the resale amount does not represent the reasonable market value of the produce actually received.

*Mr. Ncd Stein*, of Philadelphia, Pennsylvania, for respondent.

*Decision by Thomas J. Flavin, Judicial Officer*

**ORDER DENYING RESPONDENT'S PETITION FOR RECONSIDERATION**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). By order dated May 24, 1949, complainant was awarded reparation against respondent in the amount of \$867.11, with interest, and respondent's counterclaim was dismissed. On June 2, 1949, and within the time provided by the rules of practice, respondent filed a petition for reconsideration.

Respondent contends in the petition that it was error to conclude, as we did in the decision of May 24, 1949, that respondent failed to establish its damages in connection with the potatoes in car ART 24289. The facts are that complainant contracted to sell respondent a carload of potatoes grading U. S. No. 1, washed, at Chicago, Illinois, but that the potatoes shipped to respondent at Philadelphia, Pennsylvania, had approximately 9 percent permanent grade defects, as compared with a permitted maximum tolerance of not more than 6 percent. Thus there was a breach of warranty on the part of complainant. One fact to be determined in arriving at the correct amount of damages is the value, at the time of arrival, of the potatoes actually delivered. Respondent contends that the amount for which the potatoes were resold at Philadelphia represents this market value. We do not agree.

The evidence shows that the car arrived in Philadelphia at 7:30 p. m., April 21, 1946, and respondent was notified by the carrier of the arrival at 6:35 a. m. the next day. However, the potatoes were not unloaded by respondent until the evening of April 25, because of quantities of potatoes on hand. At the oral hearing, respondent offered no evidence whatever with respect to the final disposition of the potatoes. The only evidence on this point is contained in a letter from Sniling Jim Potato Company of Philadelphia, a copy of which is in the report of investigation, stating that the potatoes were purchased from respondent on April 30 at \$3 per sack. The market news reports for Philadelphia show the following minimum price quotations for U. S. No. 1, washed, potatoes: April 22, \$4.65; April 23, \$4.50; April 24, \$4.25; April 25, \$4; April 30, \$4.25. When it is considered that the resale by respondent was made 8 days after delivery and that the price received was substantially below the minimum price quotations, although the potatoes on arrival were only slightly in excess of the permitted tolerance, the price of \$3 per sack does not appear to represent the reasonable market value of the potatoes in question on or about the time of arrival.

It must be emphasized that we do not say respondent sustained no damage as a result of the breach by complainant. But it is our opinion

that respondent failed to sustain the burden of proving the amount of its damages. In the absence of such proof, respondent is not entitled to any deduction or offset from the purchase price.

Respondent points to other findings and conclusions which it believes to be incorrect. These findings and conclusions were resolved out of conflicting evidence which was fully discussed in the decision. They appear to be supported by a preponderance of the evidence and no purpose would be served by a further discussion here. The petition is hereby denied.

This order shall be published.

The reparation awarded in the order of May 24, 1949, shall be paid within 30 days from the date of this order.

Service of this order shall be made upon the parties.

(No. 2357)

Goldsby-Evans Produce Company *v.* Ernest E. Fadler Company.  
PACA Doc. No. 4674. Decided February 14, 1950.

#### **Failure to Pay Balance of Purchase Price**

Where complainant shipped four carloads of carrots to respondent on an f. o. b. basis after inspection, in accordance with the contracts of the parties, and respondent accepted the produce but remitted to complainant only a small amount in connection with such shipments, held, that respondent's failure and refusal to pay the balance of the purchase price is a violation of section 2 of the act, for which reparation, with interest, should be awarded complainant.

#### **Evidence—Facts Establishing Agency**

Where respondent-purchaser had been paying a broker a commission fee for each car shipped, this fact, together with other evidence, held to show the broker was acting as a buying agent for respondent rather than as agent for complainant-seller.

#### **Evidence—Doubts as to Admissibility in Administrative Hearings**

Doubts as to the admissibility of evidence in administrative hearings should be resolved in favor of admissibility of such evidence.

*Mr. Earl G. Strohl*, of Phoenix, Arizona, for complainant. *Mr. Warren S. Earhart*, of Kansas City, Missouri, for respondent.

*Decision by Thomas J. Flavin, Judicial Officer*

#### **PRELIMINARY STATEMENT**

By order dated January 4, 1949, in this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C.,

1946 ed., 499a *et seq.*), the complaint was dismissed and respondent was awarded \$265.27, plus interest, on its counterclaim. A copy of the order was served upon complainant on January 10, 1949. On January 19, 1949, which was within the time provided by the rules of practice, complainant filed a petition for reconsideration. In the petition complainant alleges, in effect, that designated findings and conclusions contained in the order are contrary to the preponderance of the evidence of record. A copy of the petition was served upon respondent on May 6, 1949, and respondent filed an answer to the petition. After consideration of complainant's petition and of respondent's answer thereto, reconsideration is deemed proper and is hereby granted. This order supersedes the order of January 4, 1949.

A formal complaint was filed on July 22, 1946, wherein complainant seeks to recover \$4,081.37 (later reduced to \$3,994.87), which it is alleged represents the unpaid balance of the purchase price of four carloads of carrots purchased by respondent, after inspection, on an f. o. b. basis, through negotiations conducted by J. L. Sullivan, respondent's buying agent. In answer to the complaint, respondent denies that it purchased the carrots and alleges, instead, that the shipments were made to respondent pursuant to agreements providing for inspection on arrival, with the proviso that if, upon arrival, the tops were in good, green condition, respondent would purchase the carrots at a stipulated price, but if the tops were not in satisfactory condition, then, on notification to Sullivan, respondent would handle the shipments for the account of complainant. Respondent alleges that Sullivan acted as an agent for complainant or on his own behalf. Respondent alleges further that upon arrival the tops of the carrots were in bad condition, and that respondent sold the produce for complainant's account, which resulted in a loss to respondent of \$265.27. Respondent filed a counterclaim for the \$265.27.

An oral hearing was held at Kansas City, Missouri, on October 14, 1947, at which time and place both parties were represented. The evidence introduced at the hearing consisted of the depositions, taken on complainant's application, of John M. Evans, one of the partners of complainant partnership, J. E. Best, one of complainant's employees, and J. L. Sullivan, a broker located at Phoenix, Arizona, together with the answers of these witnesses to cross-interrogatories propounded by respondent; and the oral testimony of Frank L. Kenworthy, a partner of respondent partnership.

#### FINDINGS OF FACT

1. Complainant is a partnership composed of T. B. Goldsby and J. M. Evans, doing business as Goldsby-Evans Produce Company, whose post office address is Box No. 388, Phoenix, Arizona.

2. Respondent is a partnership composed of Ernest E. Fadler and Frank L. Kenworthy, doing business as Ernest E. Fadler Company, whose post office address is Produce Exchange Building, Kansas City, Missouri. At the time of the transactions herein complained of, respondent was licensed under the act.

3. On or about June 4, 5, and 6, 1946, and contemplating shipments in the course of interstate commerce, the parties entered into contracts for the sale by complainant to respondent of four carloads of carrots, each car to consist of 346 crates, 6-dozen size, at an agreed price of \$3 per crate, plus \$50 top ice on each of the four cars, making a total purchase price of \$4,352, f. o. b. shipping point at Tolleson, Arizona.

4. The contract negotiations were carried on by J. M. Evans for complainant and J. L. Sullivan, a broker (now deceased) whose post office address was 905 W. McDowell Road, Phoenix, Arizona, who participated in the negotiations as a buying agent for respondent. Sullivan made the purchases on the basis of and after inspections made by himself or his assistant.

5. After inspection, as aforesaid, and acceptance by Sullivan, and in accordance with the contracts of the parties, complainant made the following shipments of 6-dozen size carrots from loading point in the State of Arizona to respondent at Kansas City, Missouri:

346 crates, Car SFRD-32196, Shipped June 4, 1946

346 crates, Car PFE-60115, Shipped June 4, 1946

346 crates, Car SFRD-23660, Shipped June 5, 1946

346 crates, Car SFRD-38882, Shipped June 6, 1946

6. On June 8, 1946, the parties agreed to a reduction of 25 cents per crate on the price of the carrots contained in car SFRD-32196, making a total purchase price for the four cars of \$4,265.50.

7. The four carloads of carrots shipped by complainant were received by respondent and resold by it. Respondent has paid complainant only \$184.13 of the purchase price of \$4,265.50, leaving a balance due of \$4,081.37. By letter addressed to the Department on December 20, 1946, complainant amended its complaint by reducing the amount claimed to \$3,994.87. Although requested to do so, respondent has failed and refused to pay complainant this amount, or any part thereof.

8. The formal complaint was filed on July 22, 1946, which was within 9 months after accrual of the cause of action alleged therein.

### CONCLUSIONS

The first two questions for consideration are: In what capacity did J. L. Sullivan act with respect to the contracts in question; and, were

the contracts for sales to respondent on an f. o. b. basis, after inspection, or for shipments to respondent on a consignment basis? The contracts in question were oral, and the testimony of complainant's witnesses is diametrically opposed to that of respondent.

Complainant alleges that the four carloads of carrots in question were sold on an f. o. b. basis to respondent, through negotiations entered into with J. L. Sullivan, who acted as respondent's buying agent, and that the shipments were made after inspections and acceptance by Sullivan. In support of its contentions, complainant submitted the deposition testimony of John M. Evans, a partner of complainant partnership, J. E. Best, an employee of complainant who made out the invoices covering the shipments in question, and John L. Sullivan, a broker located at Phoenix, Arizona. Evans' testimony was to the following effect: During the latter part of May 1946 Sullivan frequently came to complainant's packing shed near Tolleson, Arizona, and Sullivan's assistant, Paul Kenworthy, came each day to inspect carrots being packed by complainant. On the basis of inspections made by himself, his assistant, or Federal inspectors, Sullivan purchased five carloads of carrots [not including the shipments made the subject of this case] for respondent on an f. o. b. basis at \$3 per crate, plus \$50 per car top ice. One each of the five carloads was shipped to respondent on May 29, May 30, May 31, June 1, and June 3, 1946. J. E. Best, one of complainant's employees, typed invoices covering these five shipments but, through a misunderstanding, showed J. L. Sullivan rather than respondent as the purchaser. The five shipments were paid for with checks issued by respondent. The four carloads involved in this proceeding were purchased in the same manner as the five carloads just referred to; that is, they were purchased for respondent by Sullivan on an f. o. b. basis after inspection, and like mistakes were made by Best in invoicing these shipments. Evans testified that he had never paid Sullivan a commission or fee, and that he had never sold any carload lots of vegetables direct to Sullivan. On cross-examination Evans admitted that during the period of the transactions in question complainant had delivered carload lots of lettuce and carrots to respondent to sell on commission for complainant, and that the negotiations were carried on through J. L. Sullivan. Evans also admitted that some 10 carloads of perishables, designated by counsel for respondent, had been shipped to respondent during April 1946 to be handled by respondent as broker for complainant. But Evans listed six additional shipments which, with others, had been sold to respondent during April on an f. o. b. point of origin basis.

The testimony of J. E. Best was to the effect that he typed invoices covering shipments for complainant during May and June 1946 and



personally deposited in the mail the invoices which he had written. Best stated that when cars were shipped to respondent he was not under the impression that the produce was sold to J. L. Sullivan; and that showing the broker's name opposite the printed words "Sold to:" on the invoices resulted from a misunderstanding on his part. There were introduced in evidence copies of invoices covering sales made to three other purchasers through three different brokers, wherein similar errors had been made by Best in showing the name of the broker rather than the name of the purchaser opposite the words "Sold to." Best stated no invoice or memorandum was sent to respondent when a car was shipped on consignment.

J. L. Sullivan testified that he had been engaged in purchasing carload quantities of vegetables and melons in the area for the preceding 9 years; that he had started acting as a broker and buyer for respondent about 4 years previously, and that respondent paid him so much a car for each car purchased. Sullivan testified that his records showed he had purchased for respondent, after inspection and on an f. o. b. basis, five carloads of carrots, which were shipped to respondent during the period May 29 through June 3, 1946 [the same shipments referred to by Evans]. Sullivan further testified that he had also purchased the four carloads of carrots, which are the subject of this proceeding, for respondent after inspection and on an f. o. b. basis. His testimony with respect to the errors made in invoicing the nine shipments was in accord with the testimony of Best and Evans. Sullivan testified that it was his practice to talk by long distance telephone to respondent at Kansas City daily; that he had reported to respondent over the telephone the purchase of the four carloads in question on an f. o. b. basis; and that he gave his usual report as to quality and condition. Sullivan stated that respondent's allegations with respect to these four shipments were incorrect, and that he could recall no conversation on his part which would give respondent the impression it had about the transactions. On cross-examination Sullivan stated that during the time the four carloads in question were in transit, complainant offered two, or possibly four, additional carloads of carrots for sale to respondent and, so far as Sullivan knew, it was not contended that these cars had been sold to respondent. Sullivan stated that prior to the transactions in question, he had arranged for the making of shipments of perishables by complainant to respondent for sale on a commission basis. Sullivan denied that he had made any sales at any time for complainant, and stated that he purchased only. He denied that he acted as a broker for both parties with respect to the four shipments in question, and testified that he acted as a broker for respondent only.

In support of respondent's contentions, Frank L. Kenworthy, a partner of respondent partnership, appeared and testified at the hearing. Kenworthy stated that he had personally handled the transactions covering the four shipments in question. The witness stated that in his telephone conversations with Sullivan on or about June 4, 5, and 6, 1946, he agreed to purchase the carrots in question at about \$3 per crate, plus top ice, provided the tops were in good, green condition on arrival at Kansas City; but if the carrots arrived at destination with the tops not of a good, green color, then respondent was to reject them or handle them for complainant's account. He said he understood the actual shipper of the carrots was to be Goldsby-Evans. He denied that respondent had received any invoices from complainant covering the four shipments in controversy.

The record contains a stipulation entered into by the parties to the effect that prior to the date of the contracts in controversy, respondent had acted as a broker for complainant and had received from complainant a selling broker's commission. It should be noted, however, that later in the record it was further stipulated by counsel for the parties that "during the period of time involved respondent did buy some cars f. o. b. point of origin from Goldsby and Evans Produce Company, purchased for them by J. L. Sullivan, broker, to whom respondent paid brokerage."

Considering first the status of Sullivan, the only possible evidence to support respondent's contention that Sullivan acted as a principal in selling the carrots to respondent appears to be the fact that complainant's invoices show "Sold to: J. L. Sullivan." However, the deposition testimony of complainant's witnesses indicates that these invoices, and others similar to them, were made out erroneously to show the name of the purchaser after the words "Billed to:", and to show the name of the broker instead of the purchaser after the words "Sold to." We think it is clear that Sullivan did not buy the carrots here involved for his own account.

As to which party Sullivan represented, we think the evidence shows he acted as a buying agent for respondent. Evans' testimony, outlined above, is definitely to this effect. Because of the scarcity of commodities during the war, and the existence of a "seller's market," the practice of purchasers keeping buying agents in the producing areas was much more prevalent than theretofore. Sullivan testified unequivocally that he had never acted as a selling agent for complainant; but that for the past 4 years he had acted as a buying agent for respondent, receiving a commission from respondent for each car handled. Counsel for respondent seems to concede this point. In a letter addressed to the Department on January 27, 1947, in connection

with this proceeding, counsel referred to the fact that "Fadler was paying Sullivan a buying brokerage," and, while stating that Sullivan was hostile to respondent, concluded that "(legally of course he [Sullivan] was Fadler's agent)." We conclude that Sullivan acted as a duly authorized buying agent for respondent in connection with the four shipments here involved. *Anonymous*, PACA Docket No. 4259, decided November 16, 1944, 3 A. D. 1005.

We next consider whether the four shipments in controversy were sold to respondent on an f. o. b. basis, after inspection by respondent's agent, as contended by complainant, or were shipments to respondent for handling on a consignment basis, as contended by respondent. It is undisputed that prior to the transactions here involved, respondent, during the month of April, received about 11 designated shipments of perishables from complainant which respondent handled as a broker, and for which respondent was paid a brokerage or selling commission by complainant. During the same month there appears to have been one car shipped by complainant to respondent and purchased by the latter on arrival at destination. All of these transactions were negotiated by J. L. Sullivan. However, it is also undisputed that during the same month, six designated shipments, and others, were sold to respondent on an f. o. b. basis, after inspection. During the month of April 1946, therefore, it is clear that respondent purchased some shipments f. o. b. shipping point from complainant, and also received some shipments from complainant on consignment.

It is also undisputed that on or about May 20, 1946, complainant authorized respondent to dispose of one carload of carrots on a commission basis; and thereafter, during the period May 29 through June 6, 1946, complainant sold five carloads of carrots to respondent on an f. o. b. basis, after inspection. During the month of May 1946 then, with one exception, the only shipments made to respondent were on a sales basis. These sales involved five carloads which were shipped during a 6-day period immediately preceding the dates of the shipments in question. These five carloads are the ones complainant's witnesses refer to as constituting part of a "block of nine," the four in controversy constituting the remainder of the block. There is evidence of a sharp break in prices for carload lots of carrots (as distinguished from job lots) shortly after the shipments in question were made. Because of the "demoralized" market situation, testimony concerning the kind of contracts made by the parties after this occurrence does not appear to be particularly relevant. Evidence of the prior course of dealing between the parties which tends to make the proposition at issue either more or less probable is relevant. (*A. A. A. Highway Express, Inc. v. Hagler, et al.*, Ct. App. Ga. (1945), 34 S. E. 2 (d) 462;

and such evidence is admissible, *Anonymous*, 6 A. D. 957. We think the evidence submitted tends to support complainant's position.

Respondent denies that it received invoices covering the four shipments in question. There is evidence that the invoices were mailed and there is a presumption that they were received. However, actual receipt of these invoices was not essential to the existence of the contracts in question. Our view of the matter is that the contracts were made by Sullivan as respondent's agent, and that it makes no real difference whether the invoices were ever mailed or received.

In support of its contention that the four shipments were not sales on an f. o. b. basis, but were shipments made on a consignment basis, respondent offered in evidence a copy of a telegram sent by it to Sullivan (no date shown, but apparently received on June 8, 1946) reading as follows:

"ARRIVED ALL SHOW YELLOWING WILTED MOLDY TOPS 96645 60115 8213 AND 32196 CAN SELL SCHOENBERG CHICAGO 2.75 F. O. B. 32196 THINK EXCELLENT SALE AND SHOULD DELIVER ADVISE"

In response to the above telegram, Sullivan sent the following telegram dated June 9, 1946, to respondent:

"EVANS SAID O. K. SELL AND DELIVER SCHOENBERG 2.75 F. O. B. ICEX 50.00 32196 FONE YOU EARLY IN THE MORNING."

It will be noted that of the cars referred to in respondent's telegram, only two (60115 and 32196) are the subject of this proceeding, and *Sullivan's answer to the telegram relates to only one of the four shipments in controversy.*

With respect to these telegrams, Evans testified that, upon having the contents of respondent's telegram read over the telephone to him by Sullivan, he, Evans, was willing, in view of the declining market conditions, to reduce the invoice price on the carrots in car 32196 to \$2.75 per crate f. o. b., but that complainant was not interested in knowing to whom respondent sold the shipment. The questions and cross-questions put to Sullivan did not bring out the details of his receipt and sending of the two telegrams. At first glance, respondent's telegram might appear to support the contention of respondent that, acting as an agent, it requested instructions or approval from its principal with reference to a proposed sale of the carrots in car 32196. However, aside from any technical objections which might have been made to this evidence, arising from the fact that the telegrams were communications passing between an agent, Sullivan, and his principal, and were neither received nor sent by complainant, we think the logic

of the situation is as much on the side of complainant as on the side of respondent. For in cases of sale it is not at all unusual for a purchaser to wire his seller for a price adjustment in the face of a declining market. On the other hand, assuming, for the sake of argument, that the shipments were made to Fadler with the understanding that he could accept the carrots at destination at a stipulated price or handle on a consignment basis at his election and notify complainant, and assuming also that respondent had elected to handle on a consignment basis, it would seem unusual for respondent, under such circumstances, to wire complainant for authorization to sell to a particular customer at a particular price. At least this would seem to be true in the absence of a specific agreement of the parties as to minimum prices and qualified purchasers, and none has been shown to exist in this case. The documentary evidence submitted by respondent, therefore, is insufficient to persuade us of the correctness of its contentions.

The deposition testimony of Evans is clearly to the effect that the shipments in question were made on a sale basis. This evidence is corroborated by the deposition testimony of Sullivan and several unequivocal statements made by Sullivan to the Department which are contained in the report of investigation. Respondent has attempted to impugn the testimony of its agent, Sullivan, on the grounds that he was located near, and was sympathetic with, complainant. While it is true that Sullivan had been working in closer proximity to the place of business of complainant than respondent, and while it may also be true that he was unsympathetic with respondent, even hostile, we find no reason to question the truthfulness of his statements for such reasons. There is no indication that Sullivan had any financial interest in the outcome of this controversy, or that he would have benefitted in any way by favoring one side over the other. It is noted that there was introduced in evidence at the hearing a statement issued on August 20, 1947, by the Packer Produce Mercantile Agency, publishers of the *Red Book*, certifying that Sullivan had been issued their 1945, 1946 and 1947 Red Book business character awards. This is some evidence that Sullivan enjoyed a good reputation in the trade and tends to refute any suggestion that he would have deliberately made false statements concerning these transactions.

Numerous objections were made by counsel for respondent to the introduction of evidence by complainant at the hearing. All of these objections were overruled. While it may be that some of these objections would have been sustained if made in a trial of the action in a court of law, it must be remembered that these cases are decided by the Secretary of Agriculture, or his delegatee, not by the presiding officer who conducts the hearing. The presiding officers are expected

to resolve any doubt in favor of admissibility of evidence. This is consistent with the principle stated by the Circuit Court of Appeals for the Eighth Circuit in *Donnelly Garment Co. v. National Labor Relations Board*, 123 F. (2d) 215, at page 224, where the court said:

"Lawyers and judges frequently differ as to the admissibility of evidence, and it occasionally happens that a reviewing court regards as admissible evidence which was rejected by the judge, special master, or trial examiner. If the record on review contains not only all evidence which was clearly admissible, but also all evidence of doubtful admissibility, the court which is called upon to review the case can usually make an end of it, whereas if evidence was excluded which that court regards as having been admissible, a new trial or rehearing cannot be avoided."

Careful consideration has been given to respondent's objections. No useful purpose would be served by undertaking to discuss each of them. It is sufficient to say that we are of the opinion that complainant has sustained the burden of proving its contentions by a preponderance of competent evidence before us.

In conclusion, the four transactions in question were purchases after inspection, and on an f. o. b. basis. In such sales, there are no implied warranties of quality or condition on the part of the seller. No breach of the contracts by complainant has been established. The condition of the carrots on arrival and the amounts for which they were resold by respondent have no bearing on the controversy. Respondent's failure to pay the balance of the purchase price of the four shipments is in violation of § 2 of the act. Reparation should be awarded to complainant in the amount of \$3,994.87, the amount claimed but which appears to be slightly less than the amount actually due, with interest, and the facts should be published. Respondent's counterclaim should be dismissed.

#### ORDER

The order of January 4, 1949, is vacated.

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$3,994.87, plus interest thereon at the rate of 5 percent per annum from July 1, 1946, until paid.

Respondent's counterclaim is dismissed.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2358)

**Estrella Fruit Shipping Corporation v. Evansville Fruit Company.**  
PACA Doc. No. 5270. Decided February 16, 1950.

**Failure to Pay Balance of Purchase Price—Default**

Where respondent failed to answer complaint alleging that respondent did not pay the full purchase price for a carload of bananas, held, that such failure to file an answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, and complainant is entitled to an award of reparation for the unpaid balance of the purchase price, plus interest.\*

*Messrs. Chaffe, McCall, Toler & Phillips, of New Orleans, Louisiana, for complainant. Mr. E. D. Mulville, Presiding Officer.*

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Informal complaint was received June 16, 1949. Formal complaint was filed September 13, 1949, alleging failure on the part of the respondent to pay the full purchase price for a carload of bananas. The Department made an investigation and a copy of the report of investigation was served on complainant's attorneys November 21, 1949. On the same date copies of the report of investigation and the formal complaint were served on respondent.

At the time of service of the complaint respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint and a waiver of oral hearing. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

**FINDINGS OF FACT**

1. Complainant, Estrella Fruit Shipping Corporation, is a corporation whose post office address is 133 North Front Street, New Orleans 16, Louisiana.

2. Respondent is an individual, Wilbur W. Lawrence, trading as Evansville Fruit Company, whose post office address is 310 N. W. 9th Street, Evansville, Indiana. At the time of the transaction involved herein respondent was licensed under the act.

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

3. On or about April 16, 1949, in the course of interstate commerce, complainant sold to respondent one carload of green bananas consisting of 397 stems, 22,970 pounds, at the agreed price of seven cents per pound, amounting to \$1,607.90, plus messenger fee of \$25, or a total of \$1,632.90, f. o. b. New Orleans, Louisiana.

4. On or about April 16, 1949, complainant shipped from New Orleans, Louisiana, to the respondent in Evansville, Indiana, in a car 1C 56173, 397 stems of green bananas, weighing 22,970 pounds. Upon arrival at Evansville, Indiana, the shipment was accepted by respondent as complying with the contract.

5. Respondent has paid complainant \$575, leaving a balance due of \$1,057.90, no part of which has been paid.

6. Formal complaint was filed on September 13, 1949, which was within nine months after the cause of action accrued.

### CONCLUSIONS

The failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing as provided in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that the complainant sold to respondent 22,970 pounds of bananas at a price of seven cents per pound, f. o. b. shipping point, plus \$25 messenger service, or a total price of \$1,632.90; that the respondent accepted the bananas as conforming with the terms of the contract of sale and paid complainant \$500, leaving a balance due of \$1,132.90, no part of which has been paid. Subsequent to the filing of the complaint the respondent paid the complainant an additional \$75 which reduced the unpaid balance to \$1,057.90. From the report of investigation it appears that lack of funds was respondent's only reason for failure to make full payment. Failure of respondent to pay complainant the balance of \$1,057.90 is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$1,057.90, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this decision respondent shall pay to complainant, as reparation, \$1,057.90, with interest thereon at the rate of 5 percent per annum from May 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.



(No. 2359)

H. & M. Banana Co. v. Donald S. Grant. PACA Doc. No. 5271. Decided February 16, 1950.

**Failure to Pay Deficit—Default**

Where complainant alleged that respondent failed to pay a deficit sustained by complainant in handling of three carloads of bananas for respondent's account, and where respondent failed to file an answer to the complaint, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, and respondent's failure to pay the deficit is a violation of the act for which reparation should be awarded complainant.\*

*Messrs. Golbus & Golbus*, of Chicago, Illinois, for complainant. *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). An informal complaint was received August 19, 1948. Formal complaint was filed May 6, 1949, alleging failure on the part of respondent to pay a deficit of \$530.17 sustained by the complainant in handling, for the respondent's account, three carloads of bananas. A copy of the report of investigation made in connection with this complaint was served upon the complainant's attorney December 21, 1949. Copies of the report of investigation and the formal complaint were served upon the respondent December 24, 1948.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint and a waiver of oral hearing. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

**FINDINGS OF FACT**

1. Complainant, H. & M. Banana Co., is a corporation whose post office address is 2545 S. Parkway, Chicago, Illinois.

2. The respondent is an individual, Donald S. Grant, whose post office address is San Antonio, Texas. At the time of the transaction complained of herein, respondent was licensed under the act.

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

3. On or about February 13, 1948, respondent consigned and diverted, in interstate commerce, to complainant, to be sold for respondent's account, three carloads of bananas in cars MDT 3165, ART 26220 and FGE 52455.

4. Complainant accepted the three carloads of bananas and sold them for gross proceeds of \$919.95. Expenses in connection with the three shipments amounted to \$1,450.12, leaving a deficit due complainant from respondent of \$530.17, no part of which has been paid by respondent.

5. Informal complaint was filed within nine months after the cause of action accrued.

### CONCLUSIONS

The failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, as provided in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that in the course of interstate commerce, respondent consigned and diverted to complainant to be sold for respondent's account three carloads of bananas; that the complainant sold the bananas for \$919.95 but incurred expenses of \$1,450.12 in connection therewith; and that a deficit of \$530.17 is due to the complainant from respondent, no part of which has been paid. Correspondence in the file indicates that the respondent acknowledges the debt and there is an undated stipulation, which purports to have been signed by respondent, admitting liability for the full amount claimed, with interest. The failure of the respondent to pay the deficit due complainant is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$530.17, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$530.17, with interest thereon at the rate of 5 percent per annum from March 1, 1948, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2360)

Chester Kerlikowske v. G. S. Gleason. PACA Doc. No. 5259. Decided February 16, 1950.

### Failure to Pay Purchase Price—Default

Where complainant alleged respondent failed to pay the agreed amount for peaches consigned to the respondent to be sold for complainant's account and where respondent failed to file an answer to the complaint, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, and respondent's failure to pay the agreed sum for the peaches consigned is a violation of the act for which reparation should be awarded complainant.\*

*Mr. Russell J. Taylor*, of St. Joseph, Michigan, for complainant. *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Complainant alleges failure on the part of the respondent to pay the full amount of \$4,634.92 which was agreed upon by the parties to be due complainant for 2,200 boxes of peaches consigned to the respondent to be sold for complainant's account. An informal complaint was received July 13, 1949 and a formal complaint was filed September 15, 1949. The Department made an investigation and a copy of the report of investigation was served on complainant's attorney on November 17, 1949. Copies of the report of investigation and formal complaint were served on the respondent January 16, 1950.

At the time of service of the complaint respondent was notified in writing that an answer should be filed within 20 days thereafter and that in accordance with section 47.8 (c) of the rules of practice failure to file an answer would constitute an admission of the facts alleged in the complaint and a waiver of oral hearing. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

### FINDINGS OF FACT

1. Complainant is an individual, Chester Kerlikowske, whose post office address is Lincoln Avenue, St. Joseph, Michigan.

2. Respondent is an individual, G. S. Gleason, whose post office address is 1320 Niles Avenue, St. Joseph, Michigan. At the time of

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

the transaction involved herein respondent was licensed under the act.

3. During the month of September 1948 complainant by oral contract consigned to the respondent 2,200 boxes of peaches to be sold for complainant's account.

4. Complainant shipped in respondent's trucks from Michigan to the respondent at various destinations in other states peaches which were accepted by the respondent as being in conformance with the terms of the contract as to kind, quality, grade, and size.

5. Respondent sold the peaches for complainant's account and rendered an account of the sales. The parties agreed to an overall price of \$4,634.92.

6. Respondent paid complainant \$2,000 on said account but has not paid the balance of \$2,634.92 or any part thereof.

7. Informal complaint was filed within nine months after the cause of action accrued.

### CONCLUSIONS

The failure of the respondent to file an answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing as provided in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that pursuant to a contract between the parties complainant consigned 2,200 boxes of peaches to the respondent to be sold for complainant's account; that the respondent accepted and sold the peaches and rendered an account sales to the complainant; that the parties agreed to an overall price of \$4,634.92; that respondent has paid \$2,000 but has not paid the remaining \$2,634.92 or any part thereof. The failure of the respondent to pay the full amount due is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$2,634.92, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this decision respondent shall pay to complainant, as reparation, \$2,634.92, with interest thereon at the rate of 5 percent per annum from October 1, 1948, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2361)

PACA Doc. No. 5255.\* Decided February 16, 1950.

**Dismissal—Settlement Between Parties**

Where complainant notified the Department that an amicable settlement of the controversy involved herein has been effectuated and requested dismissal of the complaint, the complaint is dismissed.

Complainant *pro se*. *Mr. Gilbert E. Morcroft*, of Pittsburgh, Pennsylvania, for respondent. *Mr. Webster P. Marson*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**ORDER OF DISMISSAL**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). An informal complaint was received on June 8, 1949. Formal complaint was filed September 12, 1949, alleging that complainant sold to respondent on or about May 31, 1949, a carload of tomatoes in car PFE 97002, containing 780 lugs of U. S. No. 1 tomatoes at \$2.50 per lug, f. o. b. Reklaw, Texas, to be diverted to respondent at Uniontown, Pennsylvania; that although complainant shipped the kind, quality and grade of tomatoes called for in said contract of sale, respondent rejected the car on arrival; that resale resulted in net proceeds of \$727.42; and that complainant was damaged in the amount of \$1,222.58, the difference between the contract price and the net proceeds on resale. Respondent filed its answer on January 3, 1950, and requested an oral hearing.

By letter dated February 3, 1950, complainant notified the Department that the parties had made an amicable settlement of the dispute and authorized dismissal of the complaint. Accordingly, the complaint filed herein is dismissed.

Copies hereof shall be served upon the parties.

(No. 2362)

PACA Doc. No. 4923.\* Decided February 24, 1950.

**Dismissal—Failure to Sustain Burden of Proof**

Where buyer claimed damages for breach of contract on the part of the shipper, but failed to sustain the burden of proving a breach, held, the complaint should be dismissed.\*\*

\*As explained in Prefatory Note, the identities of the parties are not disclosed.—Ed.

\*\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

**Contract of Purchase and Sale—Evidence of Sale by Description**

Where the contract was for a carload of cantaloups, and the evidence was to the effect that the buyer's agent may not have inspected the cantaloups actually shipped, or, if he did inspect them, was not informed that the specific cantaloups were the ones to be shipped, it is held, that the transaction was a sale by description, not a purchase after inspection as contended by the seller.\*\*

**Evidence Failing to Establish Commodity Was Not in Suitable Shipping Condition**

Where the buyer claims damages on the ground that cantaloups received were not in suitable shipping condition, and inspection at destination after 11 days in transit showed an average of 10 percent decay, mostly in early stages, held, that the evidence fails to establish that the cantaloups were not in suitable shipping condition.\*\*

**Evidence Failing to Establish Lack of Conformity of Contract of Purchase and Sale With OPA Ceiling Prices**

Where it was contended that the contract for a carload of cantaloups was void because the price paid exceeded the OPA maximum price, held, that the evidence does not show conclusively that the purchase and sale did not conform to OPA ceiling prices.\*\*

*Mr. Edwin W. Hadley* of Gallup & Hadley, of Boston, Massachusetts, for complainant. Respondent *pro se*. *Mr. John S. Griffin*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Complainant seeks an award of reparation in the amount of \$1,169.09 for damages alleged to have been sustained in connection with its purchase of a carload of cantaloups from respondent. An informal complaint was received by the Regulatory Division, Fruit and Vegetable Branch, on March 7, 1947. A formal complaint was filed on March 15, 1948. A copy of the complaint and a copy of the report of investigation were served upon respondent on April 6, 1948. A copy of the report of investigation was served upon complainant's attorney on April 5, 1948.

Complainant alleges that on or about June 8, 1946, it purchased from respondent a carload of Pilibos Brand cantaloups, at an agreed price of \$4.64 per crate, plus \$20 for precooling, or a total price of \$1,579.04; that the melons were sold to complainant by description; and that respondent impliedly warranted that the cantaloups were in suitable shipping condition and of good merchantable quality.

\*\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

Complainant alleges further that upon arrival of the carload of cantaloups at Boston, Massachusetts, on June 19, 1946, "after a trip in all ways normal," they were found to have excessive soft rot decay, a high percentage of mold, and serious sunburn injury; that many were soft and rubbery; and that the cantaloups were not in suitable shipping condition at the time of shipment. It is also alleged that the contract price which complainant paid for the cantaloups was in excess of the valid maximum ceiling price fixed by the Office of Price Administration.

Respondent alleges in its answer filed April 19, 1948, that a carload of cantaloups containing 336 crates was sold to complainant on June 8, 1946; that the melons were inspected by complainant's agent at shipping point; and that the melons were paid for by complainant at the agreed price. Respondent denies the other allegations of the complaint. An oral hearing was requested.

A formal hearing was held at El Centro, California, on February 15, 1949. Complainant did not appear and was not represented at the hearing. Respondent was represented by \* \* \* manager of the respondent corporation. At the written request of complainant, the depositions of \* \* \* were received in evidence, together with a copy of Maximum Price Regulation No. 426, Amendment 183, a letter from G. H. Irish, Marketing Specialist, United States Department of Agriculture, addressed to complainant, dated July 25, 1946, and all of the exhibits attached to the complaint. Respondent offered in evidence the deposition of \* \* \* the shed foreman for respondent.

#### FINDINGS OF FACT

1. Complainant \* \* \* is a corporation whose post office address is \* \* \*.

2. Respondent \* \* \* is a corporation whose post office address is \* \* \*. Respondent was licensed under the act at the time of the transaction here involved.

3. On or about June 8, 1946, complainant contracted to purchase and respondent contracted to sell a carload of Pilibos Brand Cantaloupes, at an agreed price of \$4.64 per crate, plus \$20 for precooling, f. o. b. El Centro, California.

4. The purchase was made by \* \* \* complainant's authorized buying agent.

5. On June 8, 1946, respondent shipped, in interstate commerce, from El Centro, California, to complainant at Boston, Massachusetts, in car PFE 43078, 336 crates of cantaloups labeled "Pilibos Brand." \* \* \* was notified of the manifest and also received the invoice. On June 10, 1946, \* \* \* paid to respondent the full purchase

price of \$1,572.04. The shipment arrived in Boston at 3:55 a. m., June 19, 1946.

6. Informal complaint was filed in this proceeding on November 15, 1946, and within 9 months from the time the alleged cause of action accrued, and was followed by the filing of a formal complaint on March 15, 1948.

### CONCLUSIONS

Complainant authorized its buying agent, \* \* \* to purchase a carload of cantaloups from respondent on June 8, 1946. Complainant contends that \* \* \* purchased on the basis of a description, Pilibos Brand cantaloups, which required that the melons shipped by respondent be in suitable shipping condition. It is contended further that the melons shipped by respondent were not in such condition and, therefore, respondent should be liable for the loss which resulted to complainant. On the other hand, respondent contends that \* \* \* purchased the carload of melons solely on the basis of his own inspection and judgment and that complainant is without recourse in this type of transaction insofar as the quality and condition of the melons are concerned.

In support of its contentions, complainant submitted the deposition of \* \* \*. This witness stated that he was present at respondent's packing shed on June 8, 1946, and he told \* \* \* that complainant wanted a carload of Pilibos Brand cantaloups; that \* \* \* replied he would load several carloads that day and would furnish \* \* \* later in the day with the number of the car to be shipped to complainant; and that he (\* \* \*) returned to Yuma, Arizona, and it was from that place that he later called \* \* \* and received the car number. The extent of \* \* \* inspection is mentioned in his letter to the Department, dated January 25, 1947. The relevant part of this letter, a copy of which is contained in the report of investigation, reads as follows:

"With reference to the car of cantaloupes in question, P. F. E. 43078. The writer was in \* \* \* shed in the morning, and saw cantaloupes in trailers and bins, but did not actually see above car in process of loading, or after it had been loaded. The car number was given to the writer on the telephone later in the afternoon on my return to Yuma from El Centro.

"The melons inspected in the morning by the writer were of good color, showing no sign of mold, and the purchase of P. F. E. 43078, was with the understanding quality, maturity, and condition of said car was to be the same."

Respondent's witnesses \* \* \*, respondent's bookkeeper, and \* \* \*, testified in effect that car PFE 43078 was in the process of being loaded at the time \* \* \* was present at the shed and that he inspected cantaloups in bins and on the loading platform. In addition, \* \* \* testified that \* \* \* went into the car and



looked at the melons, and that he said they were very fine and "wanted to know how many we were going to load, if he could get what we were loading." \* \* \* testified that \* \* \* said he wanted car PFE 43078 and \* \* \* replied he would try to ship him that carload.

Where the buyer or his agent purchases a specific lot of produce on the basis of his own judgment of the quality and condition after an inspection, there is no warranty of merchantability. *Loose v. Flickinger*, 8 P. 2d 517 (Cal. 1932); *Paul v. Salisian*, 262 Pac. 779 (Cal. 1927); *Salzman v. Maldaver*, 24 N. W. 2d 161 (Mich. 1946) 168 ALR 389. Nor is there any warranty of suitable shipping condition. *Watsonville Exchange v. Goldstein Corporation*, 7 A. D. 1205.

In the transaction under consideration it is doubtful whether \* \* \* actually inspected any of the melons in car PFE 43078 or that he contracted to purchase for complainant that specific carload. While the contract was entered into on the morning of June 8, \* \* \* did not receive the number and manifest of the carload to be shipped until that evening. Even the testimony of \* \* \* indicates that \* \* \* was given no assurance at the time of purchase as to the specific carload to be shipped. It is concluded that the transaction between the parties was a sale by description and that \* \* \* relied upon respondent to select and ship melons which were in suitable shipping condition.

Complainant contends that the Pilibos brand was understood in the trade to mean a high quality cantaloup. It is further contended that the condition of the fruit received establishes conclusively that it was not in suitable shipping condition when shipped. On June 19, 1946, after arrival of the car at Boston, a joint inspection of the melons in the top layer of the carload was made by the National Perishable Inspection Service, Inc. and the Railroad Perishable Inspection Agency. Their reports disclose that the melons were fairly tight to many loose packs; an average of 12 percent of the fruit was soft and rubbery, balance firm; and 3 to 5 percent showed sunburn injury. As to condition, the reports state: "Range 0 to 6, average 3% soft rot decay affecting sides of fruit. Range 0 to 6, average 2% soft rot decay affecting slips. Range 0 to 18, average 9% moldy slips." It is noted that the Agency report states that the load had shifted and 76 crates were buckled, of which 57 were made good with contents undamaged. On June 21, 1946, after the cantaloups had been unloaded from the car, a Federal inspection was made. The relevant portions of the inspection certificate are as follows:

"Condition of Pack: Varying from slack to tight, mostly fairly tight. Slackness in some crates varies from one-half to two inches.

"Quality: Mature, generally well netted, few fairly well netted. Grade defects within tolerance.

"Condition: Mostly firm, many slightly flabby, ground color generally green, few turning yellow. In some samples no decay, most samples 1 to 9 melons per crate averaging approximately 10% decay, Rhizopus Rot and Cladisporium Rot mostly in early stages, some advanced stages.

"Grade: Now fails to grade U. S. No. 1 only account decay."

The melons were not officially inspected at the shipping point. At the oral hearing B. A. Harrigan, the horticultural commissioner of Imperial County, testified that a continuous inspection is made of melons crated for shipment to see that they meet with the State standardization law as to maturity, decay and other factors. According to this witness, there is no possibility that melons with mold would be shipped and that if mold developed in transit it was due to inadequate refrigeration. Mr. E. P. Ford, who was in charge of the Federal inspection service in the Imperial Valley during June 1946, stated that respondent used as great care as any of the best shippers in the area in handling melons.

We have carefully considered the evidence of record, including the facts that no evidence was offered showing Pilibos brand had any particular meaning in the trade as to quality; that the carload was 11 days in transit; and that the decay at destination was mostly in early stages. In our opinion, complainant has failed to establish by a preponderance of the evidence that the melons were not in suitable shipping condition when shipped.

Complainant contends that inasmuch as the price which it paid for the cantaloups exceeded the Office of Price Administration maximum ceiling price in effect at that time, the contract is void and that he should be permitted to recover the amount of his damages. We find no support for the complainant's contention. There was submitted in evidence a copy of OPA Maximum Price Regulation No. 426, *Amendment No. 183*, which indicated that the f. o. b. California price on cantaloups on June 8, 1946, was \$4.55. The price paid by the complainant in this case exceeded that price by 9 cents per crate. However, complainant did not submit copies of the basic maximum price regulation and we are uninformed as to any provisions which may have permitted the respondent certain additional markups which were frequently allowed by the Office of Price Administration on other perishable agricultural commodities. We do not think that complainant has shown conclusively that the purchase and sale did not conform to OPA ceiling prices.

Moreover, this case involves, not an unexecuted contract to purchase, but rather a sale which has been entirely consummated, delivery of the

commodity having been made and payment therefor received. We are not called upon to enforce a contract (whether legal or illegal). Even though complainant may have an action against respondent for violation of the maximum price regulation, this is not the forum in which to prosecute it.

It is concluded that the complainant has failed to sustain the burden resting upon it to prove the allegations of the complaint, and the complaint should, therefore, be dismissed.

### ORDER

The complaint is dismissed.

Copies hereof shall be served upon the parties.

(No. 2363)

General Fruit and Produce Company *v.* Spradlin Fruit and Vegetable Market. PACA Doc. No. 5276. Decided February 27, 1950.

### Failure to Pay—Default

Where it is alleged in the complaint that respondent failed to pay complainant the amount received from the sale of pineapples sold for complainant's account and where respondent did not file an answer, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint and respondent's failure to pay the amount shown to be due is in violation of section 2 of the act, for which amount reparation should be awarded complainant.\*

*General Fruit & Produce Co.*, of Laredo, Texas, complainant *pro se.* *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Formal complaint was filed August 15, 1949, alleging failure on the part of respondent to pay complainant \$268 received from the sale of pineapples sold for complainant's account. A copy of the report of investigation made by the Fruit and Vegetable Branch was served on complainant December 13, 1949. Copies of the report of investigation and the formal complaint were served on respondent December 12, 1949.

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter, and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

### FINDINGS OF FACT

1. Complainant is an individual, George Haworth, trading as General Fruit and Produce Company, whose post office address is P. O. Box 1578, Laredo, Texas.

2. Respondent is an individual, R. B. Spradlin, trading as Spradlin Fruit and Vegetable Market, whose post office address is 611 West Commercial Street, Springfield, Missouri. At the time of the transaction complained of herein, respondent was licensed under the act.

3. On or about May 16, 1949, complainant delivered to respondent 98 dozen Mexican pineapples valued at \$276.12. Respondent took delivery in Laredo, Texas, and transported the pineapples in its truck, in interstate commerce, to Springfield, Missouri.

4. Respondent contracted with complainant to sell the pineapples for complainant's account and any profit made above the invoice value was to be divided equally between complainant and respondent.

5. On or about June 28, 1949, respondent advised complainant that he had recovered \$268 from the sale of the pineapples and that respondent was remitting said amount, but respondent has not paid complainant the \$268 or any part thereof.

6. Formal complaint was filed August 15, 1949, which was within nine months after the cause of action accrued.

### CONCLUSIONS

The failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint as provided in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that on or about May 16, 1949, in the course of interstate commerce, complainant delivered to respondent 98 dozen Mexican pineapples valued at \$276.12 to be sold for complainant's account with the understanding that complainant and respondent were to share any profit in excess of the invoice value; that respondent sold the pineapples for \$268; but that respondent has not paid complainant the \$268 or any part thereof. Respondent's failure to pay complainant \$268 is in violation of section 2 of the act. Reparation should be awarded complainant in the amount of \$268, with interest, and the facts should be published.

**ORDER**

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$268, with interest thereon at the rate of 5 percent per annum from June 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2364)

National Produce Distributors, Inc. v. Evansville Fruit Company.  
PACA Doc. No. 5275. Decided February 27, 1950.

**Failure To Pay Balance of Purchase Price—Default**

Where complainant alleged that it sold three shipments of potatoes to respondent and respondent failed to pay the full purchase price and where respondent failed to file an answer to the complaint, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, and respondent's failure to pay the full purchase price is in violation of the act for which complainant should be awarded reparation.\*

Messrs. Golbus & Golbus, of Chicago, Illinois, for complainant. *Mr. F. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Informal complaint was received January 20, 1949. Formal complaint was filed November 29, 1949, alleging failure on the part of respondent to pay the full purchase price for three shipments of potatoes. A copy of the report of investigation, made by the Fruit and Vegetable Branch, was served on the complainant's attorneys January 12, 1950. Copies of the report of investigation and the formal complaint were served on respondent on the same date.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint and a waiver of oral hearing. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

**FINDINGS OF FACT**

1. Complainant, National Produce Distributors, Inc., is a corporation whose post office address is 31 South Water Market, Chicago, Illinois.

2. Respondent is an individual, Wilbur W. Lawrence, trading as Evansville Fruit Company, whose post office address is 310 N. W. 9th Street, Evansville, Indiana. At the time of the transactions complained of herein, respondent was licensed under the act.

3. On or about October 2, 1948, in the course of interstate commerce, complainant sold to respondent one carload of potatoes containing 2,715 10-lb. sacks of Idaho U. S. No. 1, Size A, Russets, at the agreed price of \$4.60 cwt. delivered, or a total sale price of \$1,248.90. On October 2, 1948, complainant diverted from Chicago, Illinois, to respondent at Evansville, Indiana, car PFE 91385 containing potatoes meeting the requirements of the contract.

4. On or about October 8, 1948, in the course of interstate commerce, complainant sold to respondent one carload of potatoes containing 450 sacks of Valley Cobblers at the agreed price of \$2.25 per sack delivered, or a total sales price of \$1,012.50, less freight \$333.72, or a net sales price of \$678.78. On October 29, 1948, complainant diverted from Chicago, Illinois, to respondent at Evansville, Indiana, car FGE 35564 containing potatoes meeting the requirements of the contract.

5. On or about April 19, 1949, in the course of interstate commerce, complainant sold to respondent one truckload of potatoes containing 90 sacks of Alabama Washed Triumphs, 85 sacks of Alabama U. S. No. 2, Size A, Triumphs, and 25 sacks of Alabama U. S. No. 1, Size B, Triumphs, at the respective prices of \$3.50, \$2.75, and \$2.50 f. o. b., or a total sales price of \$611.25. On April 19, 1949, complainant shipped from Foley, Alabama, to respondent at Evansville, Indiana, a truckload of potatoes meeting the requirements of the contract.

6. Respondent accepted the shipments as being in compliance with the terms of the contracts and has paid complainant \$108.13. Respondent has received credits from complainant in the amount of \$413.63, leaving a balance due of \$2,017.17, no part of which has been paid.

7. Informal complaint with respect to the two October transactions was filed January 20, 1949, which was within 9 months from the dates on which the causes of action arising from these transactions accrued. Formal complaint with respect to the April transaction was filed November 29, 1949, which was within 9 months from the date on which the cause of action on this transaction accrued.

### CONCLUSIONS

The failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing as provided for in the rules of practice (7 CFR 47.8(c)).

The facts alleged are that the complainant, pursuant to contracts between the parties, shipped to respondent two carloads and one truckload of potatoes; that respondent accepted the shipments as being in accordance with the terms of the contracts; and that respondent paid complainant \$108.13 and received credits for \$413.63, leaving a balance due of \$2,017.17, no part of which has been paid. Respondent's failure to pay the full purchase price for the shipments is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$2,017.17, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$2,017.17, with interest thereon at the rate of 5 per cent per annum from May 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2365)

PACA Doc. No. 5206.\* Decided February 27, 1950.

### Dismissal—Settlement Between Parties

Where the Department has been notified by both parties that the case has been settled amicably, and the dismissal of the complaint and counterclaim has been authorized, held, the complaint and counterclaim are hereby dismissed.

*Messrs. R. W. and LeRoy W. Gudgeon*, of Chicago, Illinois, for complainant.  
*Messrs. Golbus & Golbus*, of Chicago, Illinois, for respondent. *Mrs. Irene M. Crigler*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). A formal complaint was filed on August 8, 1949, for recovery of the unpaid balance of the purchase price of two carloads of lettuce alleged to have been sold and delivered to respondent on an f. o. b. acceptance final basis. Complainant requested an oral hearing.

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\*As explained in Prefatory Note, the identities of the parties are not disclosed.—Ed.

A copy of the formal complaint and a copy of the report of investigation prepared by the Regulatory Division were served upon respondent by registered mail on September 23, 1949. A copy of the report of investigation was also served by registered mail on complainant on the same date.

Within the time required, respondent filed an answer to the formal complaint denying liability. Respondent further alleged that the lettuce constituting one of the shipments did not meet contract requirements and, as a result thereof, respondent suffered damages for which a counterclaim was included in respondent's answer.

The Department has now been advised by both parties that they have arrived at an amicable settlement of the controversy, and dismissal of the complaint and counterclaim has been authorized. Accordingly, the complaint and counterclaim are hereby dismissed.

Copies hereof shall be served upon the parties.



## COURT DECISIONS

Central Roig Refining Co. *et al.* v. Secretary of Agriculture (Porto Rican American Sugar Refinery, Inc., *et al.*, Intervenor).<sup>\*</sup> 171 F. 2d 1016. Decided November 24, 1948.

### UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA CIRCUIT No. 9767

#### Validity of Order No. 18

Order No. 18 issued by the Secretary of Agriculture allotting the 1948 Puerto Rican refined sugar quota among Puerto Rican refiners basing ability to market on the highest single year's marketing during the period 1935-1947 did not comply with the Sugar Act of 1948 requiring allotments to give consideration to ability to market because "ability to market" meant current ability and not past performance (Reversed—Ed.).

#### Validity of Order No. 18

Order No. 18 held invalid because the Secretary of Agriculture in making allotments was not justified in failing to give any weight to processings to which proportionate shares pertained. (Reversed—Ed.)

#### Validity of Order No. 18

Order No. 18 based on past marketing measured by average of highest five years of marketing during period 1935-1941, failed to comply with Sugar Act of 1948 because "past marketings" referred to most recent preceding years. (Reversed—Ed.)

#### Validity of Order No. 18

The fact that Congress in the Sugar Act of 1948 changed the word "or" to "and" in the enumeration of the three standards to be considered by the Secretary in fixing quotas for marketing sugar, and that the change occurred after a judicial decision that the word "or" justified Secretary in denying effect to one of the standards, indicates that Secretary should give effect to all three. (Reversed—Ed.)

#### Order No. 18—Administrative Law—Judicial Review of Administrative Action

Where court held that whether Secretary of Agriculture gave consideration to necessary standards in fixing quotas for marketing Puerto Rican sugar were "question of law" subject to judicial review, and where court found failure

<sup>\*</sup>Reversed in *Secretary of Agriculture v. Central Roig Refining Co. et al.*, 94 Adv. Op. (L. ed.) 297, *infra*, p. 261.

to comply with statutory mandate, reversal of Secretary's order and remandment of case to the Secretary was required. (Reversed—Ed.)

**Order No. 18—Administrative Law—Constitutionality of Provisions of Act**

Where court held that the Secretary's Order No. 18 allotting Puerto Rican refined sugar quota among refineries of the island exceeded his authority given him by the Sugar Act of 1948, it is not necessary for court to pass on constitutionality of the act. (Reversed—Ed.)

[†1016] Appeal from Secretary of Agriculture.

Proceeding for the allotment of direct consumption sugar to be imported from [†1017] Puerto Rico to the United States. From an order of the Secretary of Agriculture making an allotment among the refiners operating in Puerto Rico, the Central Roig Refining Company and Western Sugar Refining Company appeal and the Porto Rican American Sugar Refinery, Inc., the Government of Puerto Rico, the American Sugar Refining Company and others intervened.

Order reversed and case remanded.

Mr. *Frederic P. Lee*, of Washington, D. C., for appellants.

Mr. *James A. Doyle*, Associate Solicitor, of Omaha, Neb., Department of Agriculture, of the Bar of the Supreme Court of Nebraska, pro hac vice by special leave of court, with whom Messrs. *George Morris Fay*, U. S. Atty., of Washington, D. C., and *J. Stephen Doyle, Jr.*, Special Asst. to the Atty. Gen., were on the brief, for appellee. Messrs. *Sidney S. Sachs* and *John D. Lane*, Asst. U. S. Attys. both of Washington, D. C., also entered appearances for appellee.

Messrs. *Arthur L. Quinn*, of Washington, D. C., and *Orlando J. Antonsanti*, of San Juan, P. R., with whom Mr. *Gordon P. Peyton*, of Washington, D. C., was on the brief, for intervenor Porto Rican American Sugar Refinery, Inc., urging affirmance. Mr. *Dean G. Acheson*, of Washington, D. C., with whom Mr. *Donald Hiss*, of Washington, D. C., was on the brief for intervenors American Sugar Refining Company, et al., urging affirmance.

Mr. *Walton Hamilton*, with whom Mr. *Thurman Arnold*, of Washington, D. C., was on the brief, for intervenor Government of Puerto Rico, urging reversal. Mr. *Abc Fortas*, of Washington, D. C., also entered an appearance for intervenor Government of Puerto Rico.

Before EDGERTON, CLARK, and WILBUR K. MILLER, Circuit Judges.

EDGERTON, *Circuit Judge*.

Section 207 (b) of the Sugar Act of 1948 provides that "Not more than one hundred and twenty-six thousand and thirty-three short tons, raw value, of the quota for Puerto Rico for any calendar year may be filled by direct-consumption sugar." 61 Stat. 922, 927, 7 U. S. C. A. § 1117 (b). "The quota for Puerto Rico" means the quantity of sugar that may be imported into continental United States from Puerto Rico. "Direct-consumption sugar" means, approximately, refined sugar.

Section 205 (a) of the Act provides that whenever the Secretary of Agriculture "finds that the allotment of any quota, or proration

†Italic figures in brackets refer to first word beginning a page in 171 F. 2d.—Ed.

thereof, \* \* \* is necessary to \* \* \* prevent disorderly marketing \* \* \* or to afford all interested persons an equitable opportunity to market sugar \* \* \* he shall [allot] to persons who market or import sugar \* \* \* the quantities \* \* \* which each such person may market in continental United States \* \* \* for consumption therein. Allotments shall be made in such manner and in such amounts as to provide a fair, efficient, and equitable distribution of such quota \* \* \*, by taking into consideration the processings of sugar or liquid sugar from sugar beets or sugarcane to which proportionate shares, determined pursuant to the provisions of subsection (b) of section 302, pertained,<sup>1</sup> the past marketings of importations of each such person; and the ability of such person to market or import that portion of such quota \* \* \* allotted to him." If, then, allotments are made at all, they "shall be made \* \* \* by taking into consideration" three factors or standards; (1) processings of "proportionate shares" sugar, (2) "past marketings," and (3) "ability \* \* \* to market".

Much more direct-consumption sugar is on the market in Puerto Rico than the 126,033 tons that § 207 (b) permits to be imported into the United States. In Puerto Rico Sugar Order 18, 13 Fed. Reg. 310, 313, the Secretary concluded "(1) that the allotment of the direct-consumption portion of the 1948 sugar quota for Puerto Rico is necessary to prevent disorderly marketing of such sugar and to afford all [†1018] interested persons an equitable opportunity to market such sugar in the continental United States; (2) that in order to make a fair, efficient and equitable distribution of the direct-consumption portion of such quota, as required by section 205 (a) of the act, allotments should be made by giving equal weight to (a) past marketings, measured by the average of the highest five years of such marketings by each refiner during the period 1935-1941, inclusive, and (b) ability to market, measured by the highest single year's marketings during the period 1935-1947, inclusive." The order allots direct-consumption sugar, among refiners operating in Puerto Rico, in accordance with these views.

The appellants, two refiners operating in Puerto Rico, bring the order here on appeal under § 205 of the Act. They contend that the order discriminates against them in violation of the Act and of the Constitution. They attack the constitutionality of § 207 (b) and the alleged compliance of the order with § 205 (a). Porto Rican Ameri-

<sup>1</sup> This means sugar from sugar beets or sugarcane not exceeding the producing farm's proportionate share of the quantity required to be processed to enable the producing area to meet its quota. § 301 (b).

†Italic figures in brackets refer to first word beginning a page in 171 F. 2d.—Ed.

can Sugar Refinery, Inc., to which the order is very favorable, intervenes in its support. The Government of Puerto Rico intervenes to attack the constitutionality of § 207 (b). The American Sugar Refining Company and other mainland refiners intervene to defend its constitutionality.

[1] Though the order purports to give effect to "ability to market" we think it fails to do so. The Secretary argues that "in fairness to those refiners on whom the impact of war was greatest, it is considered fair and reasonable to select a pre-war year as a proper measure of their ability. Therefore, the best single year's performance during the past 13 years is deemed to afford a fair and equitable measure of the ability of each refiner to market direct-consumption sugar." We cannot follow this argument. Performance in the 12 years before 1947 has nothing to do with ability to market in 1948. The Secretary's argument undertakes to equate each refiner's ability to market with the right to market that the Secretary thinks the refiner ought, as a matter of fairness, to have. By requiring the Secretary to take into consideration ability to market, Congress foreclosed the question whether wartime dislocations made it unfair to do so. Actual performance may be, as the order says, a better measure of ability to market than plant capacity. But since the ability to be measured is current ability, if performance is to be the measure it must be current performance.

[2] We think the order also fails to give effect to "past marketings." "Past marketings," as that term is used in the Act, plainly includes marketings within the last half-dozen years or at least the more recent of them.<sup>2</sup> It is doubtful whether the term includes anything else. As of 1948, the average of the highest five years during the period 1935-1941 is, in our opinion, no measure of "past marketings." In excluding the six years 1942-1947 the order fails to comply with the Act.

[3-5] The order does not even purport to give effect to "processings \* \* \* to which proportionate shares \* \* \* pertained." The Secretary thought this standard "not applicable" for the following reasons. In his opinion the processings to which it refers are processings of sugarcane into raw sugar and do not include the processing of raw into refined sugar.<sup>3</sup> Raw sugar "must be refined to

<sup>2</sup> Cf. "There is no merit in the contention that restricting consideration of past marketings to the preceding four years arbitrarily discriminated against those whose marketing experience antedated that period." *Gay Union Corporation v. Wallace*, 71 App. D. C. 382, 388, 112 F. 2d 192, 198 certiorari denied 310 U. S. 647, 60 S. Ct. 1098, 84 L. Ed. 1414.

<sup>3</sup> This construction is certainly a legitimate one but is not, we think, the only possible one.

produce what is commonly referred to as direct-consumption sugar. The three largest refiners in Puerto Rico (Puerto Rican American, Roig, and Igualdad) do not process raw sugar from sugarcane, but instead obtain their raw supplies from affiliated mills or from completely independent sources \* \* \*.”<sup>4</sup> No doubt facts of this sort may be considered in determining [†1019] how much weight should be given to processings of proportionate-shares sugar. In our opinion they cannot justify refusal to give this standard any weight at all. If § 205 (a) merely directed the Secretary, in making allotments, to give consideration to the several standards, his view that he need not give weight to all of them might perhaps be tenable. But it directs him to make allotments *by* taking into consideration the several standards. In our opinion this cannot be done without giving some effect to each. Any possible doubt as to the intention of Congress in this respect seems to us to be removed by the fact that in the Sugar Act of 1948<sup>5</sup> Congress changed the word “or”<sup>6</sup> to “and,” after this court had expressly held that the word “or” in the 1937 act justified the Secretary in denying effect to one of the three standards.<sup>7</sup>

[6, 7] We take these to be “questions of law” concerning which the Sugar Act requires us to review the Secretary’s order. We must therefore reverse it and remand the case to him. A majority of the court are of opinion that since the order is not authorized by the Act we cannot, within established principles of review, undertake to decide whether § 207 (b) of the Act is authorized by the Constitution. All agree that this question has been fully argued, and my own view is that we should decide it.

*Reversed.*

†Italic figures in brackets refer to first word beginning a page in 171 F. 2d.—Ed.

<sup>4</sup> The Secretary added: “Furthermore, the use of this standard would make all of the raw sugar mills in Puerto Rico eligible for an allotment of direct-consumption sugar, although the great majority of these mills do not make refined sugar which constitutes the bulk of the Puerto Rican direct-consumption sugar.” We think this erroneous. Section 205 (a) provides for allotments “to persons who market or import sugar”; meaning, evidently, persons who market or import the sort of sugar that is to be allotted. No allotment need be made to other persons.

<sup>5</sup> 7 U. S. C. A. § 1100 et seq.

<sup>6</sup> before “the ability of such person to market \* \* \*.” 50 Stat. 906, 7 U. S. C. A. § 1115 (a).

<sup>7</sup> Gay Union Corporation v. Wallace, *supra*, Note 2.

## SECRETARY OF AGRICULTURE, PETITIONER

v.

CENTRAL ROIG REFINING COMPANY, WESTERN SUGAR  
REFINING COMPANY, ET AL. (No. 27.)

PORTO RICAN AMERICAN SUGAR REFINERY, INC., PETITIONER

v.

CENTRAL ROIG REFINING COMPANY AND WESTERN SUGAR  
REFINING COMPANY. (No. 30.)

GOVERNMENT OF PUERTO RICO, PETITIONER

v.

SECRETARY OF AGRICULTURE, PORTO RICAN AMERICAN SUGAR REFINERY,  
INC., ET AL. (No. 32.),\* 94 Adv. Op. (L. ed.) 297. Decided Feb-  
ruary 6, 1950.

## SUMMARY

[†297] The Sugar Act of 1948 allots to specified domestic sugar-producing areas, some within and some without the continental United States, an annual quota of sugar, specifying the maximum number of tons which may be marketed on the mainland from each of those areas. In addition, the act establishes fixed limits on the tonnage of refined sugar which may be marketed annually on the mainland from the offshore areas as part of their total sugar quotas, but does not subject mainland refiners to quota limitations upon the marketing of refined sugar. The Secretary of Agriculture is authorized to allot the refined sugar quota of a particular area among those marketing the sugar on the mainland from an offshore area, and is specifically directed to provide a fair distribution of the quota by taking into consideration three factors: (1) processing of sugar to which [†298] proportionate shares, determined pursuant to § 302 (b) of the act, pertained; (2) past marketings; and (3) ability to market the amount allotted.

An order of the Secretary allotting the 1948 Puerto Rican refined sugar quota among the various refineries of the island was based upon findings that the proper measure as to "past marketing" and "ability to market" was a period preceding the abnormal war years, and that "the processing of sugar" to which proportionate shares pertained was a factor to be given no weight in the particular situation.

Two Puerto Rico refiners challenged the order on the ground that the Secretary had disregarded the standards imposed by the act for his guidance in making allotments of the quota, and that the act itself was invalid under the due process clause of the Fifth Amendment. A third Puerto Rico refiner intervened to defend the order against the statutory attack. The Government of Puerto Rico intervened to urge the unconstitutionality of the act, and mainland refiners inter-

\*Reversing *Central Roig Refining Co. et. al. v. Secretary of Agriculture* (Porto Rican American Sugar Refinery, Inc., et al., Interveners), 171 F. 2d 1016, *supra*, p. 256.

†Italic figures in brackets refer to first word beginning a page in 94 Adv. Op. (L. ed.) 297.—Ed.

vened to meet this attack. The Court of Appeals reversed the order as not authorized by the act.

In an opinion by FRANKFURTER, J., the Supreme Court held that the Secretary did not exceed the authority given him by the act, and that the act itself did not offend the due process clause because of the alleged discriminatory character and the oppressive effects of the refined sugar quota. Without deciding whether the Government of Puerto Rico had a standing to challenge the constitutionality of the act in this litigation, the Court dismissed certiorari.

BLACK, J., dissented, for the reasons given by the court below.

DOUGLAS, J., did not participate.

#### **Validity of Order No. 18—Proper Measure as to “Past Marketing” and “Ability to Market”**

Where Order No. 18 issued by the Secretary of Agriculture allotting the 1948 Puerto Rican refined sugar quota among various refineries of the island was based upon findings that the proper measure as to “past marketing” relates to the highest price years during the period of 1935–1941 and “ability to market” relates to the highest marketings of any year during the 1935–1947 period, and that the “processing of sugar” to which proportionate shares pertained was a factor to which no percental weight should be given, the Supreme Court held that the Secretary did not exceed the authority conferred on him by the Sugar Act of 1948, and that the Act itself does not violate the due process clause of the Fifth Amendment.\*\*

#### **Administrative Law—Scope of Judicial Review of Administrative Action**

Court will not replace Secretary's judgment with its own to hold that on the record before the Court he acted arbitrarily in reaching the conclusion that the various abnormalities in marketing of sugar were such as to call for an allotment on the basis set forth in the Secretary's order in order to achieve the legislative goal of a fair, efficient and equitable distribution of the quota; and it is not for the Court to reject the balance the Secretary struck, on consideration of all the factors, unless the Court could say that his judgment is not one that a fairminded tribunal with specialized knowledge could have reached.\*\*

#### **Scope of Commerce Clause—New Problems**

New problems generated by market controls are not outside the comprehensive scope of the Commerce Clause.\*\*

#### **Order No. 18—Commerce—Geographic Uniformity of Regulation—National Policy**

The commerce clause does not impose requirements of geographic uniformity, and hence Congress may devise, as it has done in the Sugar Act of 1948, a national policy with due regard for the varying and fluctuating interests of different regions.\*\*

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\*\*Reference to other points involved in this case will be found in the Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

**Commerce—Due Process—Commerce Clause**

Resort to the commerce clause does not preclude a consideration of the standards of due process.\*\*

**Order No. 18—Discrimination—Sugar Act of 1948—Refined Sugar Quotas—Constitutional Law—Due Process**

The Sugar Act of 1948 is not subject to the challenge that it violates the due process clause of the Fifth Amendment to the Federal Constitution as discriminatory and oppressive. It is not for the Court to reweigh the relevant factors on the basis of which Congress fixed the quotas; any discrimination disclosed here is not of such injurious character as to violate due process.\*\*

**Courts—Scope of Review of Validity of Acts of Congress**

Since Congress fixed the quotas on a historical basis it is not for the Supreme Court to reweigh the relevant factors and, perchance, substitute its notion of expediency and fairness for that of Congress, and this is so even though the quotas thus fixed may demonstrably be disadvantageous to certain areas or persons; the Supreme Court is not a tribunal for relief from the crudities and inequities of complicated experimental economic legislation.\*\*

[†299] [Nos. 27, 30, and 32.]

Argued October 17, 1949. Decided February 6, 1950.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia to review a judgment reversing, in a proceeding in which the Government of Puerto Rico intervened to urge the unconstitutionality of the Sugar Act of 1948, an order of the Secretary of Agriculture allotting the 1948 Puerto Rican refined sugar quota among various refineries of the island. Nos. 27 and 30 reversed; No. 32 dismissed.

See same case below, 171 F2d 1016.

*Neil Brooks*, of Washington, D. C., argued the cause for petitioner in No. 27.

*Orlando J. Antonsanti*, of San Juan, Puerto Rico, argued the cause for petitioner in No. 30.

*Frederic P. Lee*, of Washington, D. C., argued the cause for respondents in Nos. 27 and 30.

*Jose Trias Monge*, of San Juan, Puerto Rico, and *Walton Hamilton*, of Washington, D. C., argued the cause for petitioner in No. 32.

*Neil Brooks*, of Washington, D. C., argued the cause for respondent Secretary of Agriculture in No. 32.

*Donald R. Richberg*, of Washington, D. C., argued the cause for respondents American Sugar Refining Co. et al., in No. 32.

\*\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issues of Agriculture Decisions.—Ed.

†Italic figures in brackets refer to first word beginning a page in 94 Adv. Op. (L. ed.) 297.—Ed.



Mr. Justice FRANKFURTER delivered the opinion of the Court.

These three cases bring before us the validity of an order of the Secretary of Agriculture, issued by him on the basis of the Sugar Act of 1948. It is claimed that the Secretary disobeyed the requirements of that Act. If it be found that the Secretary brought himself within the Act, the power of Congress to give him the authority he exercised is challenged. By a series of enactments Congress addressed itself to what it found to be serious evils resulting from an uncontrolled sugar market. The central aim of this legislation was to rationalize the mischievous fluctuations of a free sugar market by the familiar device of a quota system. The Jones-Costigan Act of [May 9] 1934, 48 Stat 670, ch 263, the Sugar Act of [Sept 1] 1937, 50 Stat 903, ch 898, and the Sugar Act of [Aug 8] 1948, 61 Stat 922, ch 519, 7 USCA §§ 1100–1160, FCA title 7, §§ 1100–1160.

The volume of sugar moving to [†300] the continental United States market was controlled to secure a harmonious relation between supply and demand.<sup>1</sup> To adapt means to the purpose of the sugar legislation, the Act of 1948 defines five domestic sugar-producing areas: two in the continental United States, Hawaii, Puerto Rico and the Virgin Islands. To each area is allotted an annual quota of sugar, specifying the maximum number of tons which may be marketed on the mainland from that area. § 202 (a). A quota is likewise assigned to the Philippines. § 202 (b). The balance of the needs of consumers in the continental United States, to be determined each year by the Secretary, § 201, is met by importation from foreign countries, predominantly from Cuba, of the requisite amount of sugar. § 202 (c).

The quotas thus established apply to sugar in any form, raw or refined. In addition, § 207 of the Act establishes fixed limits on the tonnage of “direct consumption” or refined sugar<sup>2</sup> which may be marketed annually on the mainland from the offshore areas as part of their total sugar quotas. But mainland refiners are not subject to quota limitations upon the marketing of refined sugar.

The Puerto Rican quota for “direct consumption” sugar is 126,033 tons. This figure had its genesis in the Jones-Costigan Act of 1934, which provided that the quota for each offshore area was to be the

<sup>1</sup> In the course of this opinion all expressions of an economic character are to be attributed to those who have authority to make such economic judgments—the Congress and the Secretary of Agriculture—and are not to be deemed the independent judgments of the Court. It is not our right to pronounce economic views; we are confined to passing on the right of the Congress and the Secretary to act on the basis of entertainable economic judgments.

<sup>2</sup> With minor exceptions not relevant here, the term “direct consumption” sugar in the Act refers to refined sugar.

†Italic figures in brackets refer to first word beginning a page in 94 Adv. Op. (L. ed.) 297.—Ed.

largest amount shipped to the mainland in any one of the three preceding years. 48 Stat 670, 672, 673, ch 263. In the case of Puerto Rico this was computed by the Secretary at 126,033 tons. General Sugar Quota Regulations, Ser 2, Rev 1, p 4, August 17, 1935. By the Sugar Acts of 1937 and 1948, Congress embedded this amount in legislation. All the details for the control of a commodity like sugar could not, of course, be legislatively predetermined. Administrative powers are an essential part of such a regulatory scheme. The powers conferred by § 205 (a) upon the Secretary of Agriculture raise some of the serious issues in this litigation. By that section Congress authorized the Secretary to allot the refined sugar quota as well as the inclusive allowance of a particular area among those marketing the sugar on the mainland from that area.<sup>3</sup> The section provides that [†301] "Allotments shall be made in such manner and in such amounts as to provide a fair, efficient, and equitable distribution of such quota or proration thereof, by taking into consideration" three factors: (1) "processing of sugar . . . to which proportionate shares . . . pertained";<sup>4</sup> (2) past marketings; and (3) ability to market the amount allotted.

On January 21, 1948, the Secretary issued Puerto Rico Sugar Order No. 18, 13 Fed Reg 310, allotting the 1948 Puerto Rican refined sugar quota among the various refineries of the island. Having satisfied himself of the need for an allotment the Secretary, in conformity

<sup>3</sup> The full text of § 205 (a) is as follows:

"Whenever the Secretary finds that the allotment of any quota, or proration thereof, established for any area pursuant to the provisions of this Act, is necessary to assure an orderly and adequate flow of sugar or liquid sugar in the channels of interstate or foreign commerce, or to prevent disorderly marketing or importation of sugar or liquid sugar, or to maintain a continuous and stable supply of sugar or liquid sugar, or to afford all interested persons an equitable opportunity to market sugar or liquid sugar within any area's quota, after such hearing and upon such notice as he may by regulations prescribe, he shall make allotments of such quota or proration thereof by allotting to persons who market or import sugar or liquid sugar, for such periods as he may designate, the quantities of sugar or liquid sugar which each such person may market in continental United States, the Territory of Hawaii, or Puerto Rico, or may import or bring into continental United States, for consumption therein. Allotments shall be made in such manner and in such amounts as to provide a fair, efficient, and equitable distribution of such quota or proration thereof, by taking into consideration the processings of sugar or liquid sugar from sugar beets or sugarcane to which proportionate shares, determined pursuant to the provisions of subsection (b) of section 302, pertained; the past marketings or importations of each such person; and the ability of such person to market or import that portion of such quota or proration thereof allotted to him. The Secretary may also, upon such hearing and notice as he may by regulations prescribe, revise or amend any such allotment upon the same basis as the initial allotment was made."

<sup>4</sup> To help effectuate the marketing controls, § 301 of the Act provides that certain payments will be made to farmers only if they limit the marketing of sugarcane or beets grown on their farms to a "proportionate share" of the quantity necessary to fill the area's quota, plus a normal carry-over. The relevance of this provision here is that processings of sugar grown within the "proportionate share" restriction are one of the three factors to be considered by the Secretary in the making of allotments under § 205 (a).

†Italic figures in brackets refer to first word beginning a page in 94 Adv. Op. (L. ed.) 297.—Ed.

with the procedural requirements of § 205 (a), apportioned the quota among the individual refiners, setting forth in appropriate findings the manner in which he applied the three statutory standards for allotment.

As to "past marketings" he found that the proper measure was the average of the highest five years of marketings during the seven-year period of 1935-1941. While recognizing that ordinarily the most recent period of marketings furnished the appropriate data, he concluded that the period 1942-1947 was unrepresentative in that the war needs made those years abnormal and not a fair basis for purposes of the economic stabilization which was the aim of the 1948 Act. Shortages as to transportation, storage and materials, caused by the war, led to special Government control. These circumstances resulted in hardships or advantages in varying degrees to different refiners, quite unrelated to a fair system of quotas for the postwar period.

Likewise as to "the ability . . . to market," the Secretary recognized that marketings during a recent period ordinarily furnished the best measure. But again he found that the derangements of the war years served to make that measure abnormal. He therefore concluded that a fairer guide to his judgment came from the highest marketings of any year during the 1935-1947 period, using, however, present plant capacity as a corrective.

The Secretary duly considered "the processings of sugar" to which proportionate shares pertained, but concluded that this factor could not fairly be applied. This was so because it referred to processings of raw sugar from sugar cane whereas the three largest Puerto Rican refining concerns restricted themselves to refining raw sugar after it had already been processed. He felt bound, therefore, to give no weight to this factor in the sum he finally struck, and gave equal weight to past marketings and ability to market.

Availing themselves of § 205 (b), respondents, Central Roig Refining Company and Western Sugar Refining Company, two of the three largest refiners in Puerto Rico, appealed from the Secretary's order to the Court of Appeals for the District of Columbia. They charged the Secretary with disregard of the standards which Congress imposed by § 205 (a) for his guidance in making allotment of quotas; they challenged the validity of the Act itself under the Due Process Clause of the Fifth Amendment. Porto Rican American Sugar Refinery, Inc., petitioner in No. 30, the largest of the Puerto Rican refiners, intervened to [†302] defend the Secretary's order against the statutory attack.

†Italic figures in brackets refer to first word beginning a page in 94 Adv. Op. (L. ed.) 297.—Ed.

The Government of Puerto Rico, petitioner in No. 32, intervened to urge the unconstitutionality of the statute, while the American Sugar Refining Company and other mainland refiners intervened to meet this attack. Being of opinion that the Secretary's order was not authorized by the Act, the Court of Appeals reversed it. 84 App DC 161, 171 F2d 1016. Since the order failed on statutory grounds, a majority of that court did not deem it proper to decide the constitutional question. Because of the obvious importance of the decision below in the administration of the Sugar Act we granted certiorari. 336 US 950, 93 L ed 1112, 69 S Ct 888, 889.

I. In making quota allotments the Secretary of Agriculture must of course keep scrupulously within the limits set by the Sugar Act of 1948. In devising the framework of control Congress fixed the flat quotas for the sugar-producing areas. Congress could not itself, as a practical matter, allot the area quotas among individual marketers. The details on which fair judgment must be based are too shifting and judgment upon them calls for too specialized understanding to make direct congressional determination feasible. Almost inescapably the function of allotting the area quotas among individual marketers becomes an administrative function entrusted to the member of the Cabinet charged with oversight of the agricultural economy of the nation. He could not be left at large and yet he could not be rigidly bounded. Either extreme would defeat the control system. They could be avoided only by laying down standards of such breadth as inevitably to give the Secretary leeway for his expert judgment. Its exercise presumes a judgment at once comprehensive and conscientious. Accordingly, Congress instructed the Secretary to make allotments "in such manner and in such amounts as to provide a fair, efficient, and equitable distribution" of the quota.

In short, Congress gave the Secretary discretion commensurate with the legislative goal. Allocation of quotas to individual marketers was deemed an essential part of the regulatory scheme. The complexity of problems affecting raw and refined sugar in widely separated and economically disparate areas, accentuated by the instability of the differentiating factors, must have persuaded Congress of the need for continuous detailed administrative supervision.<sup>5</sup> In any event, such is the plain purport of the legislation.

<sup>5</sup> With respect to the Secretary's comparable function of fixing proportionate shares for farms under § 302 of the Act, the House Committee on Agriculture stated: "In view of the differences in conditions of production obtaining in the various sugar-producing areas, the committee has not attempted to specify the exact manner in which the Secretary shall use production history. It is the judgment of the committee that considerable discretion should be left to the Secretary to deal with the varied and changing conditions in the various producing areas, in order to establish fair and equitable proportionate shares for farms in such areas." H.R. Rep No 796, 80th Cong 1st Sess 8.

By way of guiding the Secretary in formulating a fair distribution of individual allotments, Congress directed him to exercise his discretion "by taking into consideration" three factors: past marketings, ability to market, and processings to which proportionate shares pertained. Plainly these are not mechanical or self-defining standards. They in turn imply wide areas of judgment and therefore of discretion. The fact that the Secretary's judgment is finally expressed arithmetically gives an illusory definiteness to the process of reaching it. Moreover, he is under a duty merely to take "into consideration" the particularized factors. The Secretary cannot be heedless of these factors in the sense, for instance, of refusing to hear relevant evidence bearing on [†303] them. But Congress did not think it was feasible to bind the Secretary as to the part his "consideration" of these three factors should play in his final judgment—what weight each should be given, or whether in a particular situation all three factors must play a quantitative share in his computation.

It was evidently deemed fair that in a controlled market each producer should be permitted to retain more or less the share of the market which he had acquired in the past. Accordingly, past marketings were to be taken into consideration in the Secretary's allotments. But the past is relevant only if it furnishes a representative index of the relative positions of different marketers. And there is no calculus available for determining whether a base period for measurement is fairly representative. Whether conditions have been so unusual as to make a period unrepresentative is not a matter of counting figures but of weighing imponderables. If he is to exercise the function of allotting a limited supply among avid contenders for it, the Secretary cannot escape the necessity of passing judgment on their relative competitive positions. For Congress announced that one of the main purposes justifying the making of allotments is "to afford all interested persons an equitable opportunity to market sugar." § 205 (a).

In directing the Secretary to take into consideration ability to market, Congress in effect charged the Secretary with making a forecast of the marketers' capacity to perform in the immediate future. Such a forecast no doubt draws heavily on experience, but history never quite repeats itself even in the vicissitudes of industry. Whether ability to market is most rationally measured by plant capacity or by past performance, whether, if the latter, the base period should be a year and what year or a group of years and what group—these are not questions to be dealt with as statistical problems.

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†Italic figures in brackets refer to first word beginning a page in 94 Adv. Op. (L. ed.) 297.—Ed.

They require a disinterested, informed judgment based on circumstances themselves difficult of prophetic interpretation.

The proper mode of ascertaining "processings of sugar . . . to which proportionate shares . . . pertained" is not here in controversy. Perhaps this factor too implies choice. But the question common to all three standards is whether the Secretary may conclude, after due consideration, that in the particular situation before him it is not essential that each of the three factors be quantitatively reflected in the final allotment formula. Concededly, § 205 (a) empowers the Secretary to attribute different influences to the three factors. Obviously one factor may be more influential than another in the sense of furnishing a better means of achieving a "fair, efficient, and equitable distribution." But it is not consonant with reason to authorize the Secretary to find in the context of the situation before him that a criterion has little value and is entitled to no more than nominal weight, but to find it unreasonable for him to conclude that this factor has no significance and therefore should not be at all reflected quantitatively.

Congress did not predetermine the periods of time to which the standards should be related or the respective weights to be accorded them. In this respect the sugar-quota scheme differs from the quotas designed by Congress for tobacco, wheat, cotton and rice, respectively. See §§ 313 (a), 334 (a), 344 (a) and 353 (a) of the Agricultural Act of [Feb 16] 1938, 52 Stat 31, 47, 53, 57, 61, ch 30, as amended, 7 USCA §§ 1313 (a), 1334 (a), 1344 (a), 1353 (a), FCA title 7, §§ 1313 (a), 1334 (a), 1344 (a), 1353 (a). Nor do the bare words of § 205 (a) confine the Secretary in the responsible exercise of discretion beyond the limitation inherent upon such delegated authority. He is not free to be capricious, to act without reason, that is, in relation to the attainment of the objects declared by § 205 (a). [†304] The very standards for his conduct, the attainment of "fair, efficient, and equitable distribution" preclude abstract or doctrinaire categories. A variety of plans of allotment may well conform to the statutory standards. But the choice among permissive plans is necessarily the Secretary's; he is the agency entrusted by Congress to make the choice.

These considerations dispose of this phase of the case. We would have to replace the Secretary's judgment with our own to hold that on the record before us he acted arbitrarily in reaching the conviction that the years 1935-1941 furnished a fairer measure of past marketings than the war years 1942-1947. Nor can we hold that it was

†Italic figures in brackets refer to first word beginning a page in 94 Adv. Op. (L. ed.) 297.—Ed.

baseless for him to decide that increased marketings during the war years may be taken to mean improved ability to market but decreased marketings do not justify the opposite conclusion. And it was within his province to exclude from his determination the processings of sugar to which proportionate shares pertained. It is not for us

**Headnote 1** to reject the balance he struck on consideration of all the factors unless we can say that his judgment is not one that a fair-minded tribunal with specialized knowledge could have reached.

**Headnote 2** This we cannot say. We conclude, therefore, that in issuing Order No. 18 the Secretary did not exceed the authority given him by Congress.

II. We must therefore face the challenge to the constitutionality of the Act of 1948. This objection to the order in support of their judgment below is clearly open to respondents in Nos. 27 and 30. The Government of Puerto Rico likewise challenges the constitutionality of the Act. But its status in this litigation raises a distinct issue, consideration of which will be postponed for the moment.

The sugar problem of the country is an old and obstinate one. For fourteen years Congress grappled with it through the mechanism of quotas. Three enactments, culminating in the Sugar Act of 1948, represented an effort to deal with what were deemed to be the harmful effects on interstate and foreign commerce of progressively depressed sugar prices of earlier years created by world surpluses, or, if one prefers it, by the conditions that reflected the imbalance between production and consumption.<sup>6</sup> The legislation presupposes a finding by Congress that producers and marketers of sugar could not adequately respond to market changes merely through the mechanism of a free market and that the public interest, insofar as the Commerce Clause may be drawn upon to meet it, needed controls to supplement and replace the haggling of the market.

Congress might of course have limited its intervention to the raw sugar market, trusting that thereby stability in the refined-sugar market would be produced. Congress thought otherwise; it evidently felt that competition among refiners for a legally limited supply of raw sugar, in a period of overexpanded refining capacity,<sup>7</sup> ought not to be left at large. In any event, Congress had the constitutional right to think otherwise and to bring the refining of sugar within its

<sup>6</sup> The average price per pound of duty-paid raw sugar gradually declined from 6.98 cents in 1923 to 2.80 cents in early 1932. United States Tariff Comm'n, Report to the President on Sugar, Report No. 73, 2d Ser., p. 46. See also Dalton, Sugar—A Case Study of Government Control, cc. IV, V, especially p. 41; 16 Dept State Bull 44.

<sup>7</sup> It was estimated that the mainland refineries alone had a capacity in excess of demand of from one-third to one-half. See United States Tariff Comm'n, Report to the President on Sugar, Report No. 73, 2d Series, p. 91; Cf. Sugar Institute, Inc. v. United States, 297 US 553, 574, 80 L ed 859, 863, 56 S Ct 620.

regulatory scheme. See *Mulford v. Smith*, 307 US 38, 83 L ed 1092, 59 S Ct 648; *United States v. Rock Royal Co-operative, Inc.* 307 US 533, 83 L ed [†305] 1431, 59 S Ct 954; *Wickard v. Filburn*, 317 US 111, 87 L ed 122, 63 S Ct 82.

It is a commonplace that reforms may bring in their train new difficulties. In any scheme of reform, their prevention or mitigation becomes a proper legislative concern. While ameliorating the effect of disorderly competition, market controls generate problems of their own, not encountered under a competitive system. Such new prob-

lems are not outside the comprehensive scope of the great  
 Headnote 4 Commerce Clause. Nor does the Commerce Clause impose requirements of geographic uniformity. (Compare Art 1, § 8, cl 1 and cl 4.) Congress may devise, as it has done in the Sugar Act of 1948, a national policy with due regard for the varying and fluctuating interests of different regions. See e. g., *Clark Distilling Co. v. Western Maryland R. Co.* 242 US 311, 61 L ed 326, 37 S Ct 180, LRA 1917B 1218, Ann Cas 1917B 845; *Kentucky Whip & Collar Co. v. Illinois Cent. R. Co.* 299 US 334, 81 L ed 270, 57 S Ct 277; *Prudential Ins. Co. v. Benjamin*, 328 US 408, 90 L ed 1342, 66 S Ct 1142, 164 ALR 476. And since the Act of 1948 does not even remotely impinge on any of the specific limitations upon the Commerce Clause (Art 1, § 9, cl 5 and cl 6), we are not concerned with the vexing problem of the applicability of these clauses to Puerto Rico. Compare *Downes v. Bidwell*, 182 US 244, 45 L ed 1088, 21 S Ct 770; *Dooley v. United States*, 183 US 151, 46 L ed 128, 22 S Ct 62; *Alaska v. Troy*, 258 US 101, 66 L ed 487, 42 S Ct 241; *Hooven & Allison Co v. Evatt*, 324 US 652, 670, note 5, 89 L ed 1252, 1266, 65 S Ct 870.

However, not even resort to the Commerce Clause can defy the standards of due process. We assume that these standards

Headnote 5 extend to regulations of commerce that enmesh Puerto Rico.

See *United States v. Carolene Products Co.* 304 US 144, 148-151, 82 L ed 1234, 1239-1241, 58 S Ct 778; *United States v. Darby*, 312 US 100, 125, 126, 85 L ed 609, 623, 61 S Ct 451, 132 ALR 1430;

*Balzac v. Porto Rico*, 258 US 298, 313, 66 L ed 627, 634,

Headnote 6 42 S Ct. 343. The Sugar Act of 1948 is claimed to offend the

Due Process Clause of the Fifth Amendment because of the alleged discriminatory character and the oppressive effects of the refined sugar quota established by the Act. If ever claims of this sort carried plausibility they seem to us singularly belated in view of the unfolding of the Commerce Clause.



The use of quotas on refined sugar, legislatively apportioned to different geographic areas and administratively allocated to individual beneficiaries, is a device based on the Agricultural Adjustment Act of 1938, 52 Stat 31, ch 30, as amended, 7 USCA §§ 1281 et seq., FCA title 7, §§ 1281 et seq., and sanctioned by this Court in *Mulford v. Smith*, 307 US 38, 83 L ed 1092, 59 S Ct 648, *supra*. The problem which confronted Congress was not the setting of quotas abstractly considered but so to fix their amount as to achieve approximate justice in the shares allotted to each area and the persons within it. To recognize the problem is to acknowledge its perplexities.

Congress was thus confronted with the formulation of policy peculiarly with its wide swath of discretion. It would be a singular intrusion of the judiciary into the legislative process to extrapolate restrictions upon the formulation of such an economic policy from those deeply rooted notions of justice which the Due Process Clause expresses. To fix quotas on a strict historical basis is hard on late-comers into the industry or on those in it who desire to expand. On the other hand, to the extent that newcomers are allowed to enter or old-timers to expand there must either be an increase in supply or a reduction in the quotas of others. Many other factors must plague those charged [†306] with the formulation of policy—the extent to which projected expansion is a function of efficiency or becomes a depressant of wage standards; the wise direction of capital into investments and the economic waste incident to what may be on the short or the long pull overexpansion of industrial facilities; the availability of a more suitable basis for the fixing of quotas, etc., etc. The final judgment is too apt to be a hodge-podge of consideration, including considerations that may well weigh with legislators but which this Court can hardly disentangle.

Suffice it to say that since Congress fixed the quotas on a historical basis it is not for this Court to reweigh the relevant factors and, perchance, substitute its motion of expediency and fairness for that of Congress. This is so even though the quotas thus fixed may demonstrably be disadvantageous to certain areas or persons. This Court is not a tribunal for relief from the crudities and inequities of complicated experimental economic legislation. See *Wickard v. Filburn*, *supra* (317 US at 129, 87 L ed 137, 63 S Ct 82).

Congress, it is insisted, has not established refined sugar quotas for the mainland refiners as it has for the offshore areas. Whatever inequalities may thereby be created this is not the forum for their cor-

†Italic figures in brackets refer to first word beginning a page in 94 Adv. Op. (L. ed.) 297.—Ed.

rection for the all-sufficient reason that the extent and nature of inequalities are themselves controversial matters hardly meet for judicial solution. Thus, while the mainland refiners are legally free to purchase and refine all sugar within the raw sugar quota and Puerto Rico refiners are limited to their shares of the refined sugar quota, Congress apparently thought that Puerto Rico refiners operated at costs sufficiently low to insulate them from mainland competition. In addition, it is claimed that since the total supply of raw sugar permitted to enter the mainland market is limited the mainland refiners are in effect also subject to the refined sugar quota, although in contrast to the unchanging quotas of the territories the mainland quota will vary with changes in the total consumer demand. Because this demand tends to be stable, however, the mainland refiners' share of the refined sugar has not, it is urged, greatly expanded during the years when quotas were in effect. Congress might well have thought that relatively minor contractions and expansions in supply from year to year should thus be absorbed.

Plainly it is not the business of judges to sit in judgment on the validity or the significance of such views. The Act may impose hardships here and there; the incidence of hardship may shift in location and intensity. It is not for us to have views on the merits of this legislation. It suffices that we cannot say, as we cannot, that there is "discrimination of such an injurious character as to bring into operation the due process clause." *Currin v. Wallace*, 306 US 1, 14, 83 L ed 441, 450, 59 S Ct 379. Expressions of dissatisfaction by the Executive and in some quarters of Congress that the refined sugar quotas were "arbitrary," "discriminatory," and "unfair" may reflect greater wisdom or greater fairness than the collective wisdom of Congress which put this Act on the statute books. But the issue was thrashed out in Congress; Congress is the place for its reconsideration.

III. There remains Puerto Rico's right to participate in this litigation. Puerto Rico can have no better standing to challenge the constitutionality of the Sugar Act of 1948 than if it were a full-fledged State. The right of a State to press such a claim raises familiar difficulties. Compare *Massachusetts v. Mellon*, 262 US 447, 67 L ed 1078, 43 S Ct 597; *Florida v. Mellon*, 273 US 12, 71 L ed 511, 47 S Ct 265; *Jones ex rel. Louisiana v. Bowles*, 322 US 707, 88 L ed 1551, 64 S Ct 1043, with *Georgia v. Tennessee Copper Co.* 206 US 230, 51 L ed 1038, [<sup>†</sup>307] 27 S Ct 618, 11 Ann Cas 488; *New York v. New Jersey*, 256 US 296, 65 L ed 937, 41 S Ct 492; *Georgia v. Pennsylvania R. Co.*

<sup>†</sup>Italic figures in brackets refer to first word beginning a page in 94 Adv. Op. (L. ed.) 297.—Ed.

324 US 439, 89 L ed 1051, 65 S Ct 716. Whatever rights Puerto Rico has as a polity, see *Porto Rico v. Rosaly y Castillo*, 227 US 270, 57 L ed 507, 33 S Ct 352; *Puerto Rico v. Shell Co. (P. R.)* 302 US 253, 82 L ed 235, 58 S Ct 167; *Puerto Rico v. Rubert Hermanos, Inc.* 309 US 543, 84 L ed 916, 60 S Ct 699, the Island is not a State. Additional legal questions are raised whether Puerto Rico can press the interests that it is here pressing. In view of the conclusion that we have reached on the constitutional issues which had to be met apart from any jurisdictional question, it would entail an empty discussion to decide whether Puerto Rico has a standing as a party in this case. It would in effect be merely an advisory opinion on a delicate subject. Since the real issues raised by Puerto Rico have already been decided in Nos. 27 and 30, it becomes unnecessary to decide the question of Puerto Rico's standing to sue. *Wickard v. Filburn*, *supra* (317 US at 114, note 3, 87 L ed 129, 63 S Ct 82).

Nos. 27 and 30 reversed. No. 32 dismissed.

Mr. Justice BLACK would affirm the judgment of the United States Court of Appeals for the District of Columbia for the reasons given in that court's opinion. 84 App DC 161, 171 F2d 1016.

Mr. Justice DOUGLAS took no part in the consideration or disposition of these cases.

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Amendment to Order No. 41 does not violate section 8 c (5) (G) of the act inasmuch as this section is applicable where there is a question as to a marketing agreement or order for a marketing area excluding milk, or limiting the marketing of milk products, originating in a supply area other than for the marketing area, whereas petitioners' objections relate to alleged limitations upon the exportation of milk from the supply area to a distant marketing area.....

2341 187

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2341 185

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2341 186

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Where petitioners knew the purposes of the proposed action and, in general, the considerations involved and were not misled to their detriment by the fact

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Under the circumstances, although no witness advocated the surplus milk manufacturing area, the Secretary was authorized to adopt a plan which appeared to him to be more feasible administratively and which would accomplish the desired purposes.....	2341	186
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**Validity of Amendment to**

Where petitioners claimed that the amendment to Order No. 41 effective November 1, 1947 was invalid for various reasons, which amendment provided that milk or cream which was moved outside the "surplus milk manufacturing area" would be priced at 60 cents per hundredweight over the minimum price for Class I and Class II milk which was not so moved, the amendment in question having been in effect only for the month of November 1947 for the purpose of alleviating a shortage of milk in the marketing area, it is held, that the points raised by petitioners are untenable, the amendment is valid and the relief requested by them should be denied.....	2341	185
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**ORDER NO. 68 (WICHITA, KANSAS)****CLASSIFICATION OF MILK**

Where petitioner, a handler subject to Order No. 68 regulating the handling of milk in the Wichita, Kansas Milk Marketing Area, complained in its petition that the Market Administrator erroneously reclassified petitioner's "ungraded" milk as Class I requiring a higher assessment, for the period December 1946 through April 1947, on the ground that "ungraded" milk was not regulated by the Order, it is held, that since the difference in production costs should be reflected in light of prevailing prices for milk eligible for Wichita distribution, called "graded" milk, than for other milk, called "ungraded" or "C" milk, there was no error in Market Administrator's ruling and, therefore, the relief requested by petitioner should be denied and the petition dismissed.....	2342	195
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**RIGHT TO JURY TRIAL**

Since any reparation award made under the act must be enforced in a court of law, in a suit which “. . . shall proceed in all respects like other suits for damages . . .” respondent is not precluded from a jury trial and the act is not unconstitutional in this respect.....

2346 204

**DISMISSAL****FAILURE TO STATE CAUSE OF ACTION**

Where complainant alleged that respondent commission company had refused to pay a draft drawn upon it by one W in payment for livestock purchased from complainant, it is held, that, since complainant does not claim that W purchased the livestock as agent for respondent or that respondent held out W as its agent, the mere allegation that respondent failed to honor a draft drawn upon it by W for livestock purchased by the latter does not state a cause of action under the act and, therefore, the complaint should be dismissed.....

2346 204

**MOTION****REQUEST FOR, TO EXTEND PERIOD ALLOWED TO RECONSIDER PRIOR DECISION**

Respondent's motion for the extension until April 15, 1950, of the period allowed to rehear, to reargue and to reconsider, etc., the decision and order entered January 31, 1950, granted, which extension of time shall be available also for the Livestock Branch, Production and Marketing Administration, and the prior decision and order entered January 31, 1950, shall remain in effect pending final disposition of any such petition to be filed by either party.....

2350 212

**RATES AND CHARGES****CONTINUATION OF**

By agreement of the parties the current temporary rate order of March 23, 1949 is continued in effect to and including September 30, 1951.....

2344 202

Since the parties are agreed the current temporary rate order of September 9, 1948, is continued in effect to and including March 24, 1952.....

2345 203

Inasmuch as the parties are agreed respondent is authorized to continue to assess the current rates set out in the order of April 1, 1948, as modified by the order of March 25, 1949, for a period of two years, following the effective date of this order.....

2349 211

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Where the order of inquiry charged respondent with wilful violations of various provisions of the act and respondent signed a stipulation admitting the allegations of fact alleged in the order of inquiry and consenting to a cease and desist order and to a suspension of his registration for a period of 30 days, providing such suspension be held in abeyance, which was recommended by the Livestock Branch, the respondent's registration is suspended for 30 days, which suspension is held in abeyance and shall not become effective unless respondent, within two years from the date of the order, is again found, after opportunity for a hearing, to have violated the act and the regulations thereunder.....	2348	207
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Where respondent contended that he rejected the shipment within a reasonable time, and the evidence shows that respondent was given notice of arrival at 6:30 a. m. on March 26, but did not contact complainant until March 29, at which time respondent first gave actual notice of rejection, it is held, that respondent accepted the shipment by failing to give notice within 24 hours after receipt of notice of arrival, and that, where respondent's own testimony was to the effect that some 50 bags of cabbage were unloaded on March 26 or 27, such unloading of a part of the cabbage amounted to an acceptance of the shipment.....	2354	217
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Where it was contended that the contract for a carload of cantaloups was void because the price paid exceeded the OPA maximum price, held, that the evidence does not show conclusively that the purchase and sale did not conform to OPA ceiling prices.....	2362	245
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**EVIDENCE OF SALE BY DESCRIPTION AS TERM OF**

Where the contract was for a carload of cantaloups, and the evidence was to the effect that the buyer's agent may not have inspected the cantaloups actually shipped, or, if he did inspect them, was not informed that the specific cantaloups were the ones to be shipped, it is held, that the transaction was a sale by description, not a purchase after inspection as contended by the seller.....	2362	245
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Where respondent buyer resold produce, which was slightly in excess of the tolerance permitted for the grade purchased, 8 days after arrival and for an amount far below the market value of the grade purchased, and respondent claims that it is entitled to deduct the amount received from the purchase price, held, that the resale amount does not represent the reasonable market value of the produce actually received.....	2356	226
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**FAILURE TO PAY BALANCE OF PURCHASE PRICE**

Where complainant alleged that it sold three shipments of potatoes to respondent and respondent failed to pay the full purchase price and where respondent failed to file an answer to the complaint, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, and respondent's failure to pay the full purchase price is in violation of the act for which complainant should be awarded reparation.....	2364	252
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Where complainant-seller contracted through its agent to sell to respondent-buyer a "good car of cabbage," and upon arrival of the cabbage at destination respondent and one of his employees made a doorway inspection after which respondent claimed the cabbage was in an unsatisfactory condition because of decay and yellow leaves, and subsequently removed and sold 194 bags of cabbage, abandoning 295 bags to the railroad, but at no time requested or obtained an official or independent inspection, it is held, in an action by complainant to recover the balance of the purchase price of the cabbage, that the evidence of bad condition is too general and too indefinite to support a finding that the cabbage did not meet contract requirements, and complainant should be awarded reparation with interest..... 2354 216

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Where complainant alleged respondent failed to pay the agreed amount for peaches consigned to the respondent to be sold for complainant's account and where respondent failed to file an answer to the complaint, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, and respondent's failure to pay the agreed sum for the peaches consigned is a violation of the act for which reparation should be awarded complainant.....

2360 242

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Where complainant sold a carload of lettuce to respondent, f. o. b. acceptance final, to be billed "open" to respondent, and respondent rejected the shipment because it was billed "advise" rather than "open," held, respondent is liable to complainant for the purchase price and by rejection of the produce respondent waived any claim for damages which it might otherwise have against the seller.....

2355 222

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2355 222

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Where the buyer claims damages on the ground that cantaloups received were not in suitable shipping condition, and inspection at destination after 11 days in transit showed an average of 10 percent decay, mostly in early stages, held, that the evidence fails to establish that the cantaloups were not in suitable shipping condition.....

2362 245

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Since Congress fixed the quotas on a historical basis it is not for the Supreme Court to reweigh the relevant factors and, perchance, substitute its notion of expediency and fairness for that of Congress, and this is so even though the quotas thus fixed may demonstrably be disadvantageous to certain areas or persons; the Supreme Court is not a tribunal for relief from the crudities and inequities of complicated experimental economic legislation, 94 Adv. Op. (L. ed.) 297.....	263
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**Scope of Judicial Review of Administrative Action**

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**COMMERCE**

**Geographic Uniformity of Regulation**

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\*Attention is called to *Secretary of Agriculture v. Central Roig Refining Co. et al.*, 94 Adv. Op. (L. ed.) 297, p. 261.

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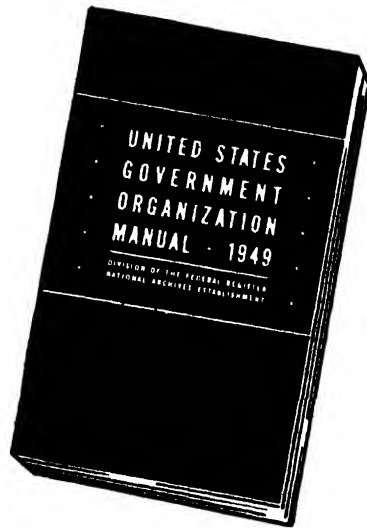
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**UNITED STATES DEPARTMENT OF AGRICULTURE**

# **AGRICULTURE DECISIONS**

**DECISIONS OF THE SECRETARY OF AGRICULTURE**

**UNDER THE  
REGULATORY LAWS ADMINISTERED IN THE  
UNITED STATES DEPARTMENT OF AGRICULTURE**

**(Including Court Decisions)**



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**By**

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**Attorney and Editor, Office of the Solicitor**

## PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered in the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial (as contrasted with quasi-legislative) character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for hearing have been given. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register. For reasons of policy, the identities of the parties are not reported in decisions issued under one statute which expressly authorizes, but does not require the publication of the facts and circumstances of a violation, unless the Secretary in his decision has specifically ordered or directed such publication.

The principal statutes concerned are the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 1946 ed. 601 *et seq.*), the Commodity Exchange Act (7 U. S. C. 1946 ed. 1 *et seq.*), the Grain Standards Act (7 U. S. C. 1946 ed. 71 *et seq.*), the Packers and Stockyards Act, 1921 (7 U. S. C. 1946 ed. 181 *et seq.*), and the Perishable Agricultural Commodities Act, 1930 (7 U. S. C. 1946 ed. 499a *et seq.*).

The decisions published are numbered serially, in the order in which they appear herein, as "Agriculture Decisions". They may be cited by giving the volume and page, for illustration, thus: 1 A. D. 472. It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D-578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in the Agriculture Decisions.

Current court decisions involving the regulatory laws administered by the Department will be published herein.

An Index-Digest and Subject-Index of the decisions reported and the court cases published herein will be found at end of each monthly issue, and the cumulative yearly Index-Digest and Subject Index, lists of decisions reported, statutes, orders, etc., construed, and statistical and other tables will be found at the end of No. 12 (December) issue of the Agriculture Decisions.

Copies of monthly issues beginning with January 1942 of the decisions will be available through the Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C.



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\*HISTORICAL NOTE.—The Secretary's decision in *In re Thatford Live Poultry, Inc.*, 1 A. D. 435, decided June 3, 1942, overruled prior decisions (Table of Decisions Overruled, 1 A. D. 819) as precedents because of lack of regulation requiring current assets to exceed current liability by at least 25 percent of average weekly purchases. Since that decision, regulation (9 CFR Cum. Supp. 201.14) setting up a standard of financial qualifications has been promulgated. *In re Albert Bree*, 3 A. D. 255 (1944).—Ed.

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\*Certiorari denied by the Supreme Court on December 6, 1948, 335 U. S. 885.—Ed.



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**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**  
**AGRICULTURE DECISIONS**

(No. 2366)

*In re* CHESTER WILLIAMS AND HOMER WILLIAMS, A CO-PARTNERSHIP  
D. B. A. WERN FARMS. AMA Doc. No. 41-33. Decided March  
20, 1950.

**Order No. 41—Plant Selling Only Certified Milk Properly Classified as  
Handler—Dismissal of Petition for Relief**

Where petitioners complained that they have been erroneously considered as a handler subject to Order No. 41, as amended, issued under the act and regulating the handling of milk in Chicago, on the ground that a plant which sold only the "certified" portion of its milk receipts in the city of Chicago could not be classified as a handler under the Chicago Order, the Judicial Officer held, that all milk at petitioners' plant was subject to the order, that it did not depend upon the quantity of milk shipped to the marketing area so long as all the milk, both certified and uncertified was approved by Chicago health authorities for distribution in the area, and that in view of the foregoing, the relief sought by petitioners should be denied and the petition dismissed.

**Hardship No Excuse for Avoiding Obligations Under Order No. 41**

Petitioners' contention that they cannot afford to handle their certified milk in a separate plant from the plant at which they handle both the certified and non-certified milk is untenable since an otherwise reasonable regulation covering a number of persons does not become invalid as to one of these persons simply because of the peculiar or unique situation of that person making it difficult for that person to conduct business operations in the usual way in which the person would like to operate, and because the law does not require that a general pricing regulation provide a profit for all persons subject to it.

**Order No. 41—Interstate Commerce—"De Minimis" Principle**

The "de minimis" principle invoked by petitioners has found little favor with the courts in recent cases where handlers have attacked orders under the act on the ground that there was only a small percentage of the handling of milk in a marketing area actually "in the current" of interstate commerce.

**Order No. 41—Mere Plant Approval by Health Authority Sufficient to Subject Plant to Federal Regulation Under Act**

All milk received at a plant approved by health authorities for the marketing area although milk was sold locally where the plant is situated and did not move in interstate commerce, held, subject to Federal regulation under the act.

**Court Decisions Followed**

*Titusville Dairy Products Company v. Charles F. Brannan*, 176 F. 2d 332 (C. C. A. 3rd 1949), *cert. denied.*, 338 U. S. 905.

*Mr. John C. Love*, of Love and Davis, Waukesha, Wisconsin, and *Mr. Matt Wallrich*, Shawano, Wisconsin, for petitioner. *Mr. Julius C. Krause* for Production and Marketing Administration. *Mr. Glen J. Gifford*, Hearing Examiner.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a proceeding under Section 8c (15) (A) of the Agricultural Adjustment Act (1933), as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 601 *et seq.*). Petitioners are partners doing business as Wern Farms in Genesee, Waukesha County, Wisconsin, where they own and operate a dairy farm and a milk plant. On the farm they produce certified milk. This milk and non-certified milk from about 20 farms in the vicinity is processed at their plant. Petitioners market some of the certified milk in Chicago, Illinois, and some in various localities in Wisconsin. The non-certified milk is sold in Wisconsin. However, all the farms supplying milk to petitioners, including their own certified milk farm, are approved by the Chicago health authorities as sources of milk for Chicago, Illinois. Petitioners plant is also so approved.

The controversy concerns Order No. 41, as amended, issued under the act and regulating the handling of milk in the Chicago, Illinois, marketing area. Petitioners complain that, effective September 1, 1947, they have been considered as a "handler" under the order and that they have been required to make the usual handler's reports and to make payments to the producer-settlement fund established by the order as well as payments on account of administrative assessments. Petitioners contend for a number of reasons discussed hereinafter that it is invalid and illegal to treat them in such fashion and they seek exemption from such requirements or modification of Order No. 41, as amended.

A hearing was held upon their petition, following the filing of an answer by the Assistant Administrator, Production and Marketing Administration, United States Department of Agriculture. The

Hearing was held in Chicago, Illinois, on May 12, 1949, before Glen J. Gifford, Hearing Examiner. Petitioners were represented at the hearing by John Love, of Love and Davis, Waukesha, Wisconsin, and by Matt Wallrich, Shawano, Wisconsin. The respondent was represented by J. C. Krause, Office of the Solicitor, United States Department of Agriculture. Following the hearing, the parties filed briefs. The hearing examiner issued a report on November 3, 1949, recommending that the relief requested by the petitioner be denied and that the petition be dismissed. The petitioners filed exceptions to the report and the respondent also filed exceptions to certain statements in the report. Oral argument upon the exceptions before the deciding officer was not requested.

#### FINDINGS OF FACT

1. Petitioners, Chester Williams and Homer Williams, are a co-partnership doing business as Wern Farms at Genesee, Waukesha County, Wisconsin, where they operate a dairy farm and a milk plant.

2. Petitioners' dairy farm produces certified milk which is received, processed and bottled at petitioners' milk plant. Petitioners regularly receive at the plant also milk from a nearby certified milk farm, Pabst Farm No. 1. In addition, petitioners receive milk at the plant from about 20 farms in the vicinity. This milk is not certified milk. The milk to be sold as certified milk is processed and handled through the plant before the milk to be sold as non-certified milk. Petitioners sell certified milk to the Bowman Dairy Company, a Chicago dealer, on daily orders. The certified milk is packaged and sold under the name of "Wern Farms" and is delivered on Bowman's retail routes to customers. Petitioners also sell certified milk in various localities in Wisconsin. Certified milk is bought and sold at a premium above regular approved milk. Petitioners sell to Bowman both certified whole milk and certified skim milk. In April 1948, they sold 2,197 quarts of certified whole milk to Bowman and in April 1949, 1,327 quarts, in April 1948, 2,170 quarts of certified homogenized whole milk and in April 1949, 1,514 quarts, in April 1948, 1,693 quarts of raw certified milk and in April 1949, 2,210 quarts, in April 1948, 15,113 quarts of certified skim or defatted milk and in April 1949, 4,382 quarts.

3. Petitioners' certified milk farm and all the farms supplying milk to petitioners' plant, as well as petitioners' plant itself, are approved by the health authorities of the City of Chicago as sources of fluid milk for distribution in Chicago.<sup>1</sup> These authorities require that all

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<sup>1</sup> This approval was obtained by petitioners and may be voluntarily abandoned by them if they no longer wish to sell milk in Chicago. Such abandonment would remove them from the reach of the order.

milk coming into a plant be Chicago-approved in order that any milk from the plant be allowed to come into Chicago. Therefore, to sell their certified milk in Chicago, all farms delivering milk to petitioners' plant have to be Chicago-approved even though the milk from such farms is sold in Wisconsin.

4. Certified milk, a name protected by copyright, is milk produced and handled under the supervision of and subject to the requirements of a private organization, the American Association of Medical Milk Commissions, Inc. The representatives of this organization in the Chicago area consist of six practicing physicians known as the Chicago Medical Commission. Two inspections a year of a certified milk establishment are made by these representatives and a field man makes monthly inspections. The standards of sanitation laid down for the production and handling of certified milk are somewhat higher than is the case for milk approved by the health authorities for the City of Chicago. However, the City of Chicago prescribes high standards for milk production and handling and treats certified milk the same as other approved milk. It does not accept the association's standards and inspections in lieu of its requirements.

5. Years ago, before the general practice of pasteurizing milk was common, there was a sizable difference between certified milk and other market milk. At the present time with pasteurization generally required and under the standards of health authorities governing the production and handling of milk for fluid uses, there is not a great deal of difference from the sanitary or health standpoint. Certified whole milk may have a higher butterfat content than the average but much non-certified milk has as high a percentage of butterfat.

6. In addition to their certified milk sales in Chicago and Wisconsin, petitioners sell regular approved market milk and cream on retail routes in Wisconsin outside the Chicago marketing area. The milk and cream so sold come primarily from the milk delivered by the 20 farms in the vicinity, but this part of petitioners' business also uses any milk produced as certified but not needed for certified milk sales. Cream separated to make certified skim milk is also utilized in this part of petitioners' business. In times of short supply, petitioners supplement their sources of milk by getting milk from other Chicago-approved plants and at times surpluses of milk go to other Chicago-approved plants. Petitioners also deliver substantial amounts of surplus to a Borden Company manufacturing plant in Waukesha which moves milk products out of Wisconsin and its distribution of non-certified market milk in Wisconsin is in direct competition with the business of a plant of the Pet Milk Company, North Prairie, which is engaged in interstate commerce and is subject to regulation under Order No. 69 issued under the act.

7. Petitioners' plant is located within the supply area for the Chicago milk market and all milk from the plant is eligible for sale in Chicago. Some of petitioners' producers formerly delivered milk to other Chicago-approved plants. A large part of Chicago's milk supply comes from Wisconsin.

8. (a) Order No. 41, as amended, originally became effective in September 1939. For the entire period in controversy here the order contained the following provisions:

"§ 941.1 *Definitions.* The following terms as used in this part have the following meanings: \* \* \*

"(c) 'Chicago, Illinois, marketing area,' hereinafter called the 'marketing area,' means the territory lying within the corporate limits of the cities of Chicago and Evanston, and the territory lying within the corporate limits of the villages of Wilmette, Kenilworth, Winnetka, Glencoe, and Oak Park, all in the State of Illinois.

"(d) 'Person' means any individual, partnership, corporation, association, or any other business unit.

"(e) 'Approved plant' means any plant which is approved by any health authority for the receiving of milk which may be disposed of as Class I milk, as defined in § 941.4, in the marketing area.

"(f) 'Producer' means any person who produces milk which is (1) received at an approved plant directly from the farm where produced, or (2) qualified, upon satisfactory proof furnished to the market administrator, to be received at an approved plant, and is caused by a handler to be delivered for his account to a plant from which no Class I milk or Class II milk is disposed of in the marketing area.

"(g) 'Handler' means any person, who, on his own behalf or on behalf of others, purchases or receives milk from producers, associations of producers, other handlers, persons producing milk not qualified to be received at an approved plant, or persons operating an unapproved plant, all, or a portion, of which milk is disposed of as Class I milk or Class II milk in the marketing area; and who, on his own behalf or on behalf of others engages in such handling of milk, or cream therefrom, as is in the current of interstate commerce or which directly burdens, obstructs, or affects interstate commerce in milk and its products. This definition shall be deemed to include any person who receives milk from producers at an approved plant from which no Class I milk or Class II milk is disposed of in the marketing area, and any cooperative association or handler with respect to the milk of any producer which it causes to be delivered to a plant from which no Class I milk or Class II milk is disposed of in the marketing area, for the account of such cooperative association or handler and such milk caused to be so delivered shall be deemed to have been received by such cooperative association or handler. \* \* \*

"(1) 'Milk' means whole milk, skim milk, cream, and all dairy products, unless the context manifests a different meaning."

(b) Section 941.4 provides for the classification of all milk received by a handler (including his own farm production), section 941.5 prescribes minimum prices for the various classifications, section 941.7 provides for determination of the uniform prices to be paid directly to producers by handlers, section 941.8 (d) provides for the producer-



settlement fund, and section 941.9 provides for the payment of administrative expenses by handlers. Section 941.6 (a) exempts from the order provisions handlers whose sole receipts of milk are from their own production and other handlers except that such handlers are required to make any reports that the market administrator may request. No exemption or exception is made for certified milk in any of the provisions of the order.

9. On August 15, 1947, A. W. Colebank, market administrator for Order No. 41, as amended, sent the following letter to petitioners:

"As we informed you orally on August 12, we have been advised by the Chicago Board of Health that all of the producers supplying your plant with milk are approved for shipment of Class I milk to the Chicago market. Further we understand from the Board of Health that your entire plant is approved for shipping Class I milk to the market. Consequently effective September 1, 1947 you will be considered a handler under Order 41, as amended, and all farms from which you are purchasing milk will be considered as producers under Order 41, as amended, if you continue to operate an approved plant after that date. This ruling applies to the Pabst Farm, on which there was some question, as well as to other farms from which you are purchasing milk."

10. Petitioners filed the required reports from September 1947. Because of petitioners' utilizations of milk in classifications higher than the average utilizations, petitioners were billed by the market administrator for payments to the producer-settlement fund. From September 1947 to March 1949, inclusive, the total of such billings amounted to \$11,238.09. Administrative assessments for this same period totalled \$1,111.30. At the time of the hearing, petitioners had paid under protest all but a small balance of the amounts for which they were debited by the market administrator.

11. Pursuant to request by petitioners, a hearing was held upon proposed amendments to Order No. 41, as amended, which would exempt producers of certified milk from the obligations of a "handler" with respect to milk not of their own production. The hearing was held in Chicago, Illinois, on June 30, 1948. On August 30, 1948, the Assistant Administrator, Production and Marketing Administration, issued his recommended decision (13 F. R. 5158) in which he recommended that no such amendment be issued for reasons stated therein. On October 25, 1948, following the filing of exceptions by petitioners, the Acting Secretary of Agriculture issued a final decision (13 F. R. 6357) in which he adopted the recommended decision, without change, and ruled upon the exceptions filed by petitioners.

### CONCLUSIONS

This proceeding is one for examination of *illegalities* in connection with an order or its administration. Section 8c (15) (A) provides

that a handler may file a petition claiming that an order, a provision thereof, or an obligation imposed thereunder "is not in accordance with law." Hence, as has been often said in decisions under section 8c (15) (A), grievances of handlers that fall short of illegality cannot be remedied in a proceeding under this part of the act.

With this preliminary observation in mind, we proceed to examination of the problems presented by the petition. At the outset, we should eliminate the question of "administrative interpretation" of the order provisions by the market administrator. A reading of the applicable provisions of the order referred to in Finding of Fact 8 shows no exemption or exception for certified milk as distinguished from regular approved milk for the marketing area. There is little room for administrative discretion or interpretation by the market administrator as to whether petitioners should be considered outside the pricing and pooling provisions of the order. As to why petitioners were not considered a "handler" prior to September 1, 1947, there is no evidence that petitioners' operations were known by the market administrator or any of his staff during the previous years of the existence of the order. There is present, then, no issue of a prior inconsistent interpretation that petitioners were not subject to the pertinent order provisions.

Hence, petitioners' case must be directed at the order provisions because these plainly provide for the actions protested. The general factual basis from which petitioners argue is that certified milk differs from regular approved milk for Chicago in production and in distribution, that their plant is approved for Chicago only because of the certified milk shipped to Chicago, that the producers supplying non-certified milk distributed in Wisconsin are Chicago-approved only because the Chicago health authorities require all milk coming into a plant to be from approved sources in order that any milk shipped from the plant be allowed to be sold in Chicago, that the non-certified milk is not intended for Chicago and is not distributed in the Chicago marketing area, and that petitioners should not have to pay the class prices or administrative assessments upon this milk destined only for distribution in Wisconsin.

Petitioners contend, that under the circumstances, the obligations imposed upon them are arbitrary, unreasonable, discriminatory, confiscatory, etc. They claim that they are required to pay Order No. 41 class prices on the non-certified milk which they sell on a market which has a lower resale price level than Chicago and that as a result they will be forced out of the certified milk business in Chicago leaving the certified milk sales there to their sole competitor. Petitioners claim they cannot afford to handle their certified milk in a

separate plant from the plant at which they handle both the certified and non-certified milk.<sup>3</sup>

An otherwise reasonable regulation covering a number of persons does not become illegal or invalid as to one of these persons simply because of the peculiar or unique situation of that person making it difficult for that person to conduct business operations in the usual way or the way in which the person would like to operate. It is not compelled by law that a general pricing regulation provide a profit for all persons subject to it. *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163 (1934); *Wawa Dairy Farms, Inc., v. Wickard*, 149 F. (2d) 860 (C. C. A. 3d, 1945). The order includes in the definition of "handler" all persons who operate plants approved by health authorities for the Chicago marketing area. The pricing and pooling provisions apply to the milk of other handlers distributed outside the marketing area just as in the case of petitioners. Petitioners do not attack the general bases upon which the order provisions were adopted, that is, they do not claim that such provisions are unreasonable upon the evidence in the promulgation records or unsupported by such evidence. They seek exemption because of their individual circumstances. They offer no proof that they cannot afford to pay class prices fixed by the order for their milk distributed in Wisconsin and they do not show how other handlers are faring who also are required to pay such prices for similar distribution. They do not make out a case of illegality on account of arbitrariness, capriciousness, unreasonableness, discrimination, etc.

Petitioners also argue that their certified milk business is not the kind of handling that was intended to be covered by the act. The act provides no exemption from orders for certified milk. Moreover, petitioners engage in the handling of non-certified milk also.

Petitioners advance, in addition, arguments to the effect that under the act and the commerce clause of Article I of the Constitution, there is no authority to regulate their handling of milk in Wisconsin. They say that their certified milk business in Chicago is only about seven percent of their total business and merely an infinitesimal part of the Chicago milk business and that, therefore, this should not justify regulation of the handling of all the milk they receive, most of which is disposed of in Wisconsin. The "de minimis" principle invoked has found little favor with the courts in recent cases where handlers have attacked orders under the act on the ground that there was only a small percentage of the handling of milk in a marketing

<sup>3</sup> Petitioners' sole competitor in Chicago at the time of the hearing, Brook Hill Farms, has its certified milk bottled in a plant in Chicago although the "Methods and Standards for the Production of Certified Milk" adopted by the American Association of Medical Commissions June 21, 1948 (Exhibit 1), require certified milk to be bottled on the farm.

area actually "in the current" of interstate commerce. *Beatrice Creamery Company et al. v. Anderson*, 75 F. Supp. 363 (D. Kansas); *Balasz et al. v. Brannan*, N. D. Ohio, September 29, 1949. Under other statutes, the Supreme Court has refused to deny jurisdiction under similar circumstances. *Connecticut Light and Power Co. v. Federal Power Commission*, 324 U. S. 515 (1945); *Mabee et al. v. White Plains Publishing Co., Inc.*, 327 U. S. 178 (1946).

Aside from the "de minimis" question, however, the coverage of the order is not restricted to plants shipping milk or cream to the marketing area. Plants approved for the distribution of milk in the marketing area are included. The definition of "handler" in section 941.1 (g) of the order carries also the language "who \* \* \* engages in such handling of milk, or cream therefrom, as is in the current of interstate commerce or which directly burdens, obstructs, or affects interstate commerce in milk and its products." So that even if petitioners shipped no milk at all to Chicago they would still be subject to the order provisions if their handling directly burdens, obstructs or affects interstate commerce in milk and its products. This is the language also of section 8c (1) of the act and has been declared constitutional by the Supreme Court in *United States v. Wrightwood Dairy Company*, 315 U. S. 110 (1942), involving Order No. 41 in issue here, and *United States v. Rock Royal Cooperative, Inc.*, 307 U. S. 533 (1939). In the *Wrightwood* case, the Court held that the act confers the full scope of the commerce clause of Article I of the Constitution.

That petitioners' handling falls within the meaning of the handler definition and thus the statutory language is demonstrated by the facts. Some of their handling is actually "in the current" of interstate commerce, that is, their certified milk shipments to Chicago and their disposition of milk to the manufacturing plant which moves its products in interstate commerce.

As to their handling which they describe as "intrastate," its connections with interstate commerce and the Chicago marketing area are not remote and unsubstantial. Petitioners do not have a completely insulated separation between their certified milk business in Chicago and the rest of their business. Certified milk produced as such but not needed for certified milk sales goes out as non-certified milk in petitioners' Wisconsin milk business. How much of the certified milk produced goes to Chicago and how much is sold in Wisconsin depends upon relative market demands. Cream separated from certified skim milk sent to Chicago is sold on routes in Wisconsin together with other cream. Petitioners' Wisconsin non-certified business is in direct competition with the plant of the Pet Milk Com-

pany at North Prairie, a plant engaged in interstate commerce in milk and its products and subject to Order No. 69 under the act. When petitioners require additional milk for their non-certified milk business in Wisconsin, they obtain Chicago-approved supplies from other handlers and when they have a surplus of milk, some of it goes to Chicago-approved plants. Hence in shortage periods, they obtain milk for their needs from the Chicago pool and in "flush" periods they add their surplus to the burden of the surplus in the Chicago pool.

Furthermore, petitioners' sources of milk and their plant are approved for Chicago distribution, a marketing area in which a substantial part of the marketing is interstate in character with very large supplies of milk and cream coming in from Wisconsin. Petitioners are located within this supply area for the Chicago marketing area. The producers supplying the non-certified milk to the plant must meet the health and sanitary standards prescribed by the Chicago health authorities. Milk from petitioners' plant is thus identified as available for distribution in Chicago. Recently, the United States Circuit Court of Appeals for the Third Circuit held that Order No. 27, as amended, applying to the New York marketing area, was constitutional and valid in its provisions for pricing, pooling, etc., all milk received at a plant approved by the health authorities for the marketing area although milk was sold locally in Pennsylvania where the plant was situated and did not move in interstate commerce to New York. *Titusville Dairy Products Company v. Charles F. Brannan*, 176 F. (2d) 332 (C. C. A. 3d, 1949), *cert. denied*, 338 U. S. 905 (1949).

Petitioners attack the refusal of the Secretary to amend the order to exclude their operations from the order provisions as a result of the hearing referred to in Finding of Fact 11. Their position in this proceeding is not so much in the way of insisting that, on the basis of the record in that proceeding, the Secretary should have exempted them. Rather, petitioners have gone into the question *de novo* in this proceeding in their evidence and arguments. At any rate, we find no grounds advanced by petitioners in this proceeding that compel us to conclude that the Secretary's refusal to amend the order as desired by petitioners was not "in accordance with law" or that the order as it exists is "not in accordance with law" as it applies to petitioners. Of course, any exceptions, objections or arguments of petitioners that may not have been specifically discussed in this decision are considered to be without controlling merit.

**ORDER**

In view of the foregoing, the relief requested by the petitioners is denied and the petition is dismissed.

(No. 2367)

*In re* MARKET AGENCIES AT KANSAS CITY STOCK YARDS. P&S Doc. No. 311. Decided March 2, 1950.

**Continuation of Rates and Charges**

Respondents' petitions requesting that the current authorization be continued in effect to and including March 14, 1951, and that they be authorized to establish maximum buying charges on other than rail shipments on the basis of a carload equivalent of 26,000 pounds, granted.

*Mr. John J. Murray* for Livestock Branch, Production and Marketing Administration. *Mr. C. J. Kaney*, of Kansas City, Missouri, for market agency members of Kansas City Livestock Exchange. *Mr. W. F. O'Neal*, of Kansas City, Missouri, for Farmers Union Cooperative Association. *Mr. Lester H. Ryon*, of Kansas City, Missouri, for Producers Livestock Association and for Texas Live Stock Association. *Mr. Harry Conley et al.*, of Kansas City, Missouri, for 9 independent buyer associations.

*Decision by Thomas J. Flavin, Judicial Officer*

**CONSENT ORDER**

This is a rate proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*).

The respondents are presently operating under an order dated March 1, 1949 (8 A. D. 250), authorizing assessment of the current rates which were set out in a Tariff No. 9 attached to previous petition filed on February 1, 1949, until and including March 13, 1950.

On February 9, 1950, petitions were filed on behalf of the respondents requesting that the current authorization be continued in effect to and including March 14, 1951. Respondents have also requested that they be authorized to establish maximum buying charges on other than rail shipments on the basis of a carload equivalent of 26,000 pounds.

On February 16, 1950, the Livestock Branch filed an answer recommending that the petition be granted.

Inasmuch as the parties are agreed the order of March 1, 1949, is extended to and including March 14, 1951. In addition the order of March 1, 1949, as extended is modified so as to authorize the changes in Section C of the current Tariff No. 9 requested by respondent and indicated in red on the copy of Tariff No. 9 attached to one of the petitions filed on February 9, 1950.

The schedule of rates presently in effect, i. e. Tariff No. 9, was authorized by the order of March 1, 1949. That order granted a petition filed on February 1, 1949. Notice of that petition was published in the Federal Register on February 11, 1949 (14 F. R. 628). No interested party indicated a desire to be heard in the matter. This order merely continues the provisions of the current order in effect for an additional period of one year and establishes maximum buying charges on other than rail shipments on the basis of a carload equivalent of 26,000 pounds. No additional revenue will be produced for the respondents by this action. In view of the foregoing, it is found that notice and public procedure are unnecessary in connection with this order.

This order shall become effective on March 14, 1950, and remain in effect for a period of one year unless changed by further order before that date.

The respondents who have been assessing the current rates for nearly a year need no time to prepare for and be ready to comply with the provisions of this order. This order will not be effective for several weeks. It is in the public interest that it become effective on March 14, 1950, lest marketing facilities be adversely affected. Accordingly, good cause is found for making it effective in less than thirty days.

Copies hereof shall be served upon the parties by registered mail or in person.

(No. 2368)

*In re* MARKET AGENCIES AT THE NEW ORLEANS STOCK YARDS, ARABI, LOUISIANA. P&S Doc. No. 534. Decided March 14, 1950.

#### **Modification of Rates and Charges**

Inasmuch as the parties are agreed with respect to the rates petitioned for and no objection has been filed the petition is granted subject to the terms of the informal agreement between the parties set out in the answer filed on March 6, 1950, and, for good cause shown, this order shall become effective in less than 30 days.

*Mr. John J. Murray* for Livestock Branch, Production and Marketing Administration. *Mr. William T. Quinn*, President of New Orleans Live Stock Exchange, Arabi, Louisiana, for respondents.

*Decision by Thomas J. Flavin, Judicial Officer*

#### **ORDER**

This is a rate proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*).

The respondents are now operating under an order entered in this proceeding on April 8, 1937, the docket then being entitled, Louis Bagneris, an individual, and other market agencies operating at the New Orleans Stock Yards, Arabi, Louisiana (Bureau of Animal Industry Docket No. 534), as modified by an order dated October 6, 1947 (6 A. D. 999).

On February 2, 1950, respondents filed a petition requesting authority to file and put into effect a new Tariff No. 7, copy of which was attached to the petition and has been made a part of this docket.

Notice of this petition was published in the Federal Register on February 18, 1950 (15 F. R. 898) and opportunity to be heard upon the matter was afforded all interested persons. A copy of this notice has been served upon each of the respondents. This notice set out in detail all of the rates provided for in the new Tariff No. 7. No objection to the action petitioned for has been received.

On March 6, 1950, the Livestock Branch, Production and Marketing Administration, filed an answer recommending that the petition be granted and stating that respondents have agreed to furnish certain information to the Livestock Branch before the first day of March each year. The Livestock Branch further recommended that the operation of this order be limited to one year.

Inasmuch as the parties are agreed with respect to the rates petitioned for and no objection has been filed the petition is granted subject to the terms of the informal agreement between the parties set out in the answer filed on March 6, 1950. However, respondents shall file, with the Hearing Clerk, United States Department of Agriculture, Washington 25, D. C., a statement to the effect that they agree to furnish the information set out in the answer before March 1 of each year. A copy of the answer has been served upon each of the respondents.

The respondents, who must comply with this rule on its effective date, wish to have it become effective as soon as possible. All interested parties have had an opportunity to be heard on the proposed rule. The Packers and Stockyards Act provides that no order of this nature shall become effective in less than five days after its date of signature. Any undue delay in making this order effective may adversely affect marketing facilities. Accordingly, good cause is found for making it effective in less than 30 days.

This order shall become effective on the sixth day after its date of signature provided respondents shall have filed the statement, with respect to furnishing the information agreed upon, with the Hearing Clerk before that date. It shall remain in effect for a period of one



year following its effective date unless it shall be changed by further order during the one year period.

Copies hereof shall be served upon the parties by registered mail or in person.

(No. 2369)

*In re* CHARLES K. PETERS. P&S Doc. No. 1879. Decided March 22, 1950.

**Suspension of Registration—Violations of Act—Cease and Desist**

Inasmuch as respondent admitted the allegations that he wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the Packers and Stockyards Act and wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the Federal Trade Commission Act by paying employed weighmasters at the stockyards for favorable but false weights on cattle bought and sold by respondent, the respondent's registration is suspended for a period of six months in view of the mitigating circumstances, and he is ordered to cease and desist from committing the violations of the act and the regulations issued thereunder.\*

*Mr. Elmer J. Scott* for complainant. *Mr. Chas. K. Peters*, of Kansas City, Missouri, respondent *pro se*.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to as the act. The order of inquiry and notice of hearing, filed January 26, 1950, charges that respondent wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the act and wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the so-called Federal Trade Commission Act, which section is incorporated in and made a part of the Packers and Stockyards Act by section 402 of the latter act.

The respondent filed an answer on February 8, 1950, in which he admitted the facts alleged in the order of inquiry, waived the right to an oral hearing, and consented to the entry of an appropriate order without further notice.

**FINDINGS OF FACT**

1. At all times mentioned herein, the respondent was registered with the Secretary of Agriculture as a dealer pursuant to the act to

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

buy and sell cattle for his own account at the Kansas City Stock Yards, Kansas City, Missouri.

2. The Kansas City Stock Yards, Kansas City, Missouri, hereinafter referred to as the stockyards, at all times mentioned herein was a posted stockyard subject to the provisions of the act.

3. During the years 1948 and 1949 the respondent paid certain sums of money at divers times to Joe L. Brown, Cecil Cox, Bart Fay, Bruno Ising, and Culver Jordan, each of whom during that period of time was employed as a weighmaster at the stockyards and whose duty it was to determine correctly the weight of livestock weighed on scales in the stockyards, for the purpose and with the effect of compensating said weighmasters for recording weights on scale tickets showing the weight of cattle bought by respondent at less than the true and correct weight thereof and showing the weight of cattle sold by respondent at a weight greater than the true and correct weight thereof and said scale tickets were made a part of the records and memoranda kept by the operator of the stockyards. The respondent paid for cattle purchased by him and collected for cattle sold by him on the basis of the false weights shown on the scale tickets.

### CONCLUSIONS

The respondent, by making payments to weighmasters in return for favorable weights, clearly violated section 312 (a) of the act and caused false weight records to be made by the operator of the stockyards in violation of section 10 of the so-called Federal Trade Commission Act. The nature of the violations implies wilfulness. The effect of the practice of paying weighmasters was that respondent, when buying cattle, paid for less weight than he received and, when selling cattle, received payment for more weight than he delivered. The practice is dishonest and is a flagrant violation of the act which cannot be condemned too strongly.

The causing of false weight records to be made by the operator of the stockyards is also a serious violation. False information tends to conceal violations of the act and to mislead enforcement officials so that the enforcement of the act is seriously hampered and frustrated.

The Livestock Branch has submitted for consideration a statement to the effect that recently the respondent discontinued the practice of paying weighmasters. After that, certain weighmasters, instead of favoring the respondent, penalized him by incorrect weighing. In view of those mitigating facts, a suspension of respondent's registration for a period of six months is deemed to be sufficient. A cease and desist order should also be issued.

**ORDER**

The respondent shall cease and desist from:

1. Engaging in unfair and deceptive practices and devices; and
2. Causing false entries to be made in the records of the operator of the stockyards.

The respondent's registration under the act is suspended for a period of six months from the effective date hereof. A copy of this order shall be served upon the respondent and it shall become effective five days after service.

(No. 2370)

*In re* ED. W. GORMAN. P&S Doc. No. 1874. Decided March 22, 1950.

**Suspension of Registration—Violation of Act—Cease and Desist**

Inasmuch as respondent admitted the allegations that he wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the Packers and Stockyards Act, and wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the Federal Trade Commission Act by paying employed weighmasters at the stockyards for favorable but false weights on cattle bought and sold by respondent, the respondent's registration is suspended for a period of ten months, and he is ordered to cease and desist from commission of the violations of the act and the regulations issued thereunder.\*

*Mr. Elmer J. Scott* for complainant. *Mr. Ed. W. Gorman*, of Kansas City, Kansas, respondent *pro se*.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to as the act. The order of inquiry and notice of hearing filed January 26, 1950, charges that respondent wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the act and wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the so-called Federal Trade Commission Act, which section is incorporated in and made a part of the Packers and Stockyards Act by section 402 of the latter act.

The respondent filed an answer on February 6, 1950, in which he admitted the facts alleged in the order of inquiry, waived the right to an oral hearing, and consented to the entry of an appropriate order without further notice.

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

### FINDINGS OF FACT

1. At all times mentioned herein, the respondent was registered with the Secretary of Agriculture as a dealer pursuant to the act to buy and sell cattle for his own account at the Kansas City Stock Yards, Kansas City, Missouri.

2. The Kansas City Stock Yards, Kansas City, Missouri, hereinafter referred to as the stockyards, at all times mentioned herein was a posted stockyard subject to the provisions of the act.

3. During the period from on or about February 1, 1949, to January 10, 1950, the respondent paid certain sums of money and gave certain objects of value at divers times to Joe L. Brown, Frank E. Clark, Cecil Cox, Bruno Ising, and Culver Jordan, each of whom during that period of time was employed as a weighmaster at the stockyards and whose duty it was to determine correctly the weight of livestock weighed on scales at the stockyards, for the purpose and with the effect of compensating said weighmasters for recording weights on scale tickets showing the weight of cattle bought by respondent at less than the true and correct weight thereof and showing the weights of cattle sold by respondent at a weight greater than the true and correct weight thereof and said scale tickets were made a part of the records and memoranda kept by the operator of the stockyards. The respondents paid for cattle purchased by him and collected for cattle sold by him on the basis of the false weights shown on said scale tickets.

### CONCLUSIONS

The respondent, by making payments to weighmasters in return for favorable weights, clearly violated section 312 (a) of the act and caused false weight records to be made by the operator of the stockyards in violation of section 10 of the so-called Federal Trade Commission Act. The nature of the violations implies wilfulness. The effect of the practice of paying weighmasters was that respondent, when buying cattle, paid for less weight than he received and, when selling cattle, received payment for more weight than he delivered. The practice is dishonest and is a flagrant violation of the act which cannot be condemned too strongly.

The causing of false weight records to be made by the operator of the stockyards is also a serious violation. False information tends to conceal violations of the act and to mislead enforcement officials so that the enforcement of the act is seriously hampered and frustrated.

In view of the seriousness of the violations set forth a suspension of respondent's registration for a period of ten months coupled with a cease and desist order is warranted.

**ORDER**

The respondent shall cease and desist from :

1. Engaging in unfair and deceptive practices and devices; and
2. Causing false entries to be made in the records of the operator of the stockyards.

The respondent's registration under the act is suspended for a period of ten months from the effective date hereof. A copy of this order shall be served upon the respondent and it shall become effective five days after service.

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(No. 2371)

*In re* R. V. HARTMAN. P&S Doc. No. 1875. Decided March 22, 1950.

Same as 9 A. D. 306

*Mr. Elmer J. Scott* for complainant. *Mr. R. V. Hartman*, of Kansas City, Missouri, respondent *pro se*.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to as the act. The order of inquiry and notice of hearing filed January 26, 1950, charges that respondent wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the act and wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the so-called Federal Trade Commission Act, which section is incorporated in and made a part of the Packers and Stockyards Act by section 402 of the latter act.

The respondent filed an answer on February 6, 1950, in which he admitted the facts alleged in the order of inquiry, waived the right to an oral hearing, and consented to the entry of an appropriate order without further notice.

**FINDINGS OF FACT**

1. At all times mentioned herein, the respondent was registered with the Secretary of Agriculture as a dealer pursuant to the act to buy and sell cattle for his own account at the Kansas City Stock Yards, Kansas City, Missouri.

2. The Kansas City Stock Yards, Kansas City, Missouri, hereinafter referred to as the stockyards, at all times mentioned herein was a posted stockyard subject to the provisions of the act.

3. During the period from on or about January 1, 1945, to January

17, 1950, the respondent paid certain sums of money and gave certain objects of value at divers times to Culver Jordan, Bart Fay, Cecil Cox, Bruno Ising, Joe L. Brown, William E. Miller and Elmer Tuttle, each of whom during that period of time was employed as a weighmaster at the stockyards and whose duty it was to determine correctly the weight of livestock weighed on scales at the stockyards, for the purpose and with the effect of compensating said weighmasters for recording weights on scale tickets showing the weight of cattle bought by respondent at less than the true and correct weight thereof and showing the weight of cattle sold by respondent at a weight greater than the true and correct weight thereof and said scale tickets were made a part of the records and memoranda kept by the operator of the stockyards. The respondent paid for cattle purchased by him and collected for cattle sold by him on the basis of the false weights shown on said scale tickets.

### CONCLUSIONS

The respondent, by making payments to weighmasters in return for favorable weights, clearly violated section 312 (a) of the act and caused false weight records to be made by the operator of the stockyards in violation of section 10 of the so-called Federal Trade Commission Act. The nature of the violations implies wilfulness. The effect of the practice of paying weighmasters was that respondent, when buying cattle, paid for less weight than he received and, when selling cattle, received payment for more weight than he delivered. The practice is dishonest and is a flagrant violation of the act which cannot be condemned too strongly.

The causing of false weight records to be made by the operator of the stockyards is also a serious violation. False information tends to conceal violations of the act and to mislead enforcement officials so that the enforcement of the act is seriously hampered and frustrated.

In view of the seriousness of the violations set forth a suspension of respondent's registration for a period of ten months coupled with a cease and desist order is warranted.

### ORDER

The respondent shall cease and desist from:

1. Engaging in unfair and deceptive practices and devices; and
2. Causing false entries to be made in the records of the operator of the stockyards.

The respondent's registration under the act is suspended for a period of ten months from the effective date hereof. A copy of this order shall be served upon the respondent and it shall become effective five days after service.

(No. 2372)

*In re* G. E. HIBLER, P&S Doc. No. 1877. Decided March 22, 1950.

Same as 9 A. D. 306

*Mr. Elmer J. Scott* for complainant. *Mr. G. E. Hibler*, of Kansas City, Missouri, respondent *pro se*.*Decision by Thomas J. Flavin, Judicial Officer***PRELIMINARY STATEMENT**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to as the act. The order of inquiry and notice of hearing filed January 26, 1950, charges that respondent wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the act and wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the so-called Federal Trade Commission Act, which section is incorporated in and made a part of the Packers and Stockyards Act by section 402 of the latter act.

The respondent filed an answer on February 7, 1950, in which he admitted the facts alleged in the order of inquiry, waived the right to an oral hearing, and consented to the entry of an appropriate order without further notice.

**FINDINGS OF FACT**

1. At all times mentioned herein, the respondent was registered with the Secretary of Agriculture as a dealer pursuant to the act to buy and sell cattle for his own account at the Kansas City Stock Yards, Kansas City, Missouri.

2. The Kansas City Stock Yards, Kansas City, Missouri, hereinafter referred to as the stockyards, at all times mentioned herein was a posted stockyard subject to the provisions of the act.

3. During the period from on or about January 1, 1948, to January 19, 1950, the respondent paid certain sums of money at divers times to Bruno Ising and Culver Jordan, each of whom during that period of time was employed as a weighmaster at the stockyards and whose duty it was to determine correctly the weight of livestock weighed on scales in the stockyards, for the purpose and with the effect of compensating said weighmasters for recording weights on scale tickets showing the weight of cattle bought by respondent at less than the true and correct weight thereof and showing the weight of cattle sold by respondent at a weight greater than the true and correct weight

thereof and said scale tickets were made a part of the records and memoranda kept by the operator of the stockyards. The respondent paid for cattle purchased by him and collected for cattle sold by him on the basis of the false weights shown on said scale tickets.

### CONCLUSIONS

The respondent, by making payments to weighmasters in return for favorable weights, clearly violated section 312 (a) of the act and caused false weight records to be made by the operator of the stockyards in violation of section 10 of the so-called Federal Trade Commission Act. The nature of the violations implies wilfulness. The effect of the practice of paying weighmasters was that respondent, when buying cattle, paid for less weight than he received and, when selling cattle, received payment for more weight than he delivered. The practice is dishonest and is a flagrant violation of the act which cannot be condemned too strongly.

The causing of false weight records to be made by the operator of the stockyards is also a serious violation. False information tends to conceal violations of the act and to mislead enforcement officials so that the enforcement of the act is seriously hampered and frustrated.

In view of the seriousness of the violation set forth a suspension of respondent's registration for a period of ten months coupled with a cease and desist order is warranted.

### ORDER

The respondent shall cease and desist from :

1. Engaging in unfair and deceptive practices and devices; and
2. Causing false entries to be made in the records of the operator of the stockyards.

The respondent's registration under the act is suspended for a period of ten months from the effective date hereof. A copy of this order shall be served upon the respondent and it shall become effective five days after service.

(No. 2373)

*In re* ALBERT HOLTZ. P&S Doc. No. 1878. Decided March 22, 1950.

Same as 9 A. D. 306

*Mr. Elmer J. Scott*, for complainant. *Mr. Albert Holtz*, of Kansas City, Missouri, respondent *pro se*.

*Decision by Thomas J. Flavin, Judicial Officer*



### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to as the act. The order of inquiry and notice of hearing filed January 26, 1950, charges that respondent wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the act and wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the so-called Federal Trade Commission Act, which section is incorporated in and made a part of the Packers and Stockyards Act by section 402 of the latter act.

The respondent filed an answer on February 7, 1950, in which he admitted the facts alleged in the order of inquiry, waived the right to an oral hearing, and consented to the entry of an appropriate order without further notice.

### FINDINGS OF FACT

1. At all times mentioned herein, the respondent was registered with the Secretary of Agriculture as a dealer pursuant to the act to buy and sell cattle for his own account at the Kansas City Stock Yards, Kansas City, Missouri.

2. The Kansas City Stock Yards, Kansas City, Missouri, hereinafter referred to as the stockyards, at all times mentioned herein was a posted stockyard subject to the provisions of the act.

3. During the period from on or about March 15, 1949, to January 17, 1950, the respondent paid certain sums of money at divers times to Frank E. Clark and other persons, each of whom during that period of time was employed as a weighmaster at the stockyards and whose duty it was to determine correctly the weight of livestock weighed on scales in the stockyards, for the purpose and with the effect of compensating said weighmasters for recording weights on scale tickets showing the weight of cattle bought by respondent at less than the true and correct weight thereof and showing the weight of cattle sold by respondent at a weight greater than the true and correct weight thereof and said scale tickets were made a part of the records and memoranda kept by the operator of the stockyards. The respondent paid for cattle purchased by him and collected for cattle sold by him on the basis of the false weights shown on the scale tickets.

### CONCLUSIONS

The respondent, by making payments to weighmasters in return for favorable weights, clearly violated section 312 (a) of the act and

caused false weight records to be made by the operator of the stockyards in violation of section 10 of the so-called Federal Trade Commission Act. The nature of the violations implies wilfulness. The effect of the practice of paying weighmasters was that respondent, when buying cattle, paid for less weight than he received and, when selling cattle, received payment for more weight than he delivered. The practice is dishonest and is a flagrant violation of the act which cannot be condemned too strongly.

The causing of false weight records to be made by the operator of the stockyards is also a serious violation. False information tends to conceal violations of the act and to mislead enforcement officials so that the enforcement of the act is seriously hampered and frustrated.

In view of the seriousness of the violations set forth a suspension of respondent's registration for a period of ten months coupled with a cease and desist order is warranted.

#### ORDER

The respondent shall cease and desist from:

1. Engaging in unfair and deceptive practices and devices; and
2. Causing false entries to be made in the records of the operator of the stockyards.

The respondent's registration under the act is suspended for a period of ten months from the effective date hereof. A copy of this order shall be served upon the respondent and it shall become effective five days after service.

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(No. 2374)

*In re* B. R. PHILLIPS. P&S Doc. No. 1881. Decided March 22, 1950.

Same as 9 A. D. 306

*Mr. Elmer J. Scott* for complainant. *Mr. B. R. Phillips*, of Edwardsville, Kansas, respondent *pro se*.

*Decision by Thomas J. Flavin, Judicial Officer*

#### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to as the act. The order of inquiry and notice of hearing, filed January 26, 1950, charges that respondent wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the act and wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section

10 of the so-called Federal Trade Commission Act, which section is incorporated in and made a part of the Packers and Stockyards Act by section 402 of the latter act.

The respondent filed an answer on February 7, in which he admitted the facts alleged in the order of inquiry, waived the right to an oral hearing, and consented to the entry of an appropriate order without further notice.

#### FINDINGS OF FACT

1. At all times mentioned herein, the respondent was registered with the Secretary of Agriculture as a dealer pursuant to the act to buy and sell cattle for his own account at the Kansas City Stock Yards, Kansas City, Missouri.

2. The Kansas City Stock Yards, Kansas City, Missouri, hereinafter referred to as the stockyards, at all times mentioned herein was a posted stockyard subject to the provisions of the act.

3. During the period from on or about July 1, 1947, to January 17, 1950, respondent paid certain sums of money at divers times to Joe L. Brown, Frank E. Clark, Bart Fay, Bruno Ising, and Culver Jordan, each of whom during that period of time was employed as a weighmaster at the stockyards and whose duty it was to determine correctly the weight of livestock weighed on scales at the stockyards, for the purpose and with the effect of compensating said weighmasters for recording weights on scale tickets showing the weight of cattle bought by respondent at less than the true and correct weight of the cattle and showing the weight of cattle sold by respondent at a weight greater than the true and correct weight thereof and said scale tickets were made a part of the records and memoranda kept by the operator of the stockyards. The respondent paid for cattle purchased by him and collected for cattle sold by him on the basis of the false weights shown on said scale tickets.

#### CONCLUSIONS

The respondent, by making payments to weighmasters in return for favorable weights, clearly violated section 312 (a) of the act and caused false weight records to be made by the operator of the stockyards in violation of section 10 of the so-called Federal Trade Commission Act. The nature of the violations implies wilfulness. The effect of the practice of paying weighmasters was that respondent, when buying cattle, paid for less weight than he received and, when selling cattle, received payment for more weight than he delivered. The practice is dishonest and is a flagrant violation of the act which cannot be condemned too strongly.

The causing of false weight records to be made by the operator of the stockyards is also a serious violation. False information tends to conceal violations of the act and to mislead enforcement officials so that the enforcement of the act is seriously hampered and frustrated.

In view of the seriousness of the violations set forth a suspension of respondent's registration for a period of ten months coupled with a cease and desist order is warranted.

#### ORDER

The respondent shall cease and desist from:

1. Engaging in unfair and deceptive practices and devices; and
2. Causing false entries to be made in the records of the operator of the stockyards.

The respondent's registration under the act is suspended for a period of ten months from the effective date hereof. A copy of this order shall be served upon the respondent and it shall become effective five days after service.

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(No. 2375)

*In re* ROLAND E. RONEY. P&S Doc. No. 1880. Decided March 22, 1950.

Same as 9 A. D. 306

*Mr. Elmer J. Scott* for complainant. *Mr. Roland E. Roney*, of Lawrence, Kansas, respondent *pro se*.

*Decision by Thomas J. Flavin, Judicial Officer*

#### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to as the act. The order of inquiry and notice of hearing filed January 26, 1950, charges that respondent wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the act and wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the so-called Federal Trade Commission Act, which section is incorporated in and made a part of the Packers and Stockyards Act by section 402 of the latter act.

The respondent filed an answer on February 10, 1950, in which he admitted the facts alleged in the order of inquiry, waived the right

to an oral hearing, and consented to the entry of an appropriate order without further notice.

### FINDINGS OF FACT

1. At all times mentioned herein, the respondent was registered with the Secretary of Agriculture as a dealer pursuant to the act to buy and sell cattle for his own account at the Kansas City Stock Yards, Kansas City, Missouri.

2. The Kansas City Stock Yards, Kansas City, Missouri, hereinafter referred to as the stockyards, at all times mentioned herein was a posted stockyard subject to the provisions of the act.

3. During the years 1948 and 1949, respondent paid certain sums of money at divers times to Bruno Ising, Culver Jordan and Bart Fay, each of whom during that period of time was employed as a weighmaster at the stockyards, and whose duty it was to determine correctly the weight of livestock weighed on scales at the stockyards, for the purpose and with the effect of compensating said weighmasters for recording weights on scale tickets showing the weight of cattle bought by respondent at less than the true and correct weight thereof and showing the weight of cattle sold by respondent at a weight greater than the true and correct weight thereof and said scale tickets were made a part of the records and memoranda kept by the operator of the stockyards. The respondent paid for cattle purchased by him and collected for cattle sold by him on the basis of the false weights shown on said scale tickets.

### CONCLUSIONS

The respondent, by making payments to weighmasters in return for favorable weights, clearly violated section 312 (a) of the act and caused false weight records to be made by the operator of the stockyards in violation of section 10 of the so-called Federal Trade Commission Act. The nature of the violations implies wilfulness. The effect of the practice of paying weighmasters was that respondent, when buying cattle, paid for less weight than he received and, when selling cattle, received payment for more weight than he delivered. The practice is dishonest and is a flagrant violation of the act which cannot be condemned too strongly.

The causing of false weight records to be made by the operator of the stockyards is also a serious violation. False information tends to conceal violations of the act and to mislead enforcement officials so that the enforcement of the act is seriously hampered and frustrated.

In view of the seriousness of the violations set forth a suspension of respondent's registration for a period of ten months coupled with a cease and desist order is warranted.

### ORDER

The respondent shall cease and desist from:

1. Engaging in unfair and deceptive practices and devices; and
2. Causing false entries to be made in the records of the operator of the stockyards.

The respondent's registration under the act is suspended for a period of ten months from the effective date hereof. A copy of this order shall be served upon the respondent and it shall become effective five days after service.

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(No. 2376)

*In re* ALBERT M. ROSS. P&S Doc. No. 1882. Decided March 22, 1950.

Same as 9 A. D. 306

*Mr. Elmer J. Scott* for complainant. *Mr. Albert M. Ross*, of Kansas City, Missouri, respondent *pro se*.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to as the act. The order of inquiry and notice of hearing filed January 26, 1950, charges that respondent wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the act and wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the so-called Federal Trade Commission Act, which section is incorporated in and made a part of the Packers and Stockyards Act by section 402 of the latter act.

The respondent filed an answer on February 7, 1950, in which he admitted the facts alleged in the order of inquiry, waived the right to an oral hearing, and consented to the entry of an appropriate order without further notice.

### FINDINGS OF FACT

1. At all times mentioned herein the respondent was registered with the Secretary of Agriculture as a dealer pursuant to the act to buy

and sell cattle for his own account at the Kansas City Stock Yards, Kansas City, Missouri.

2. The Kansas City Stock Yards, Kansas City, Missouri, hereinafter referred to as the stockyards, at all times mentioned herein was a posted stockyard subject to the provisions of the act.

3. During the period from on or about January 1, 1949, to January 6, 1950, respondent paid certain sums of money at divers times to Frank E. Clark, Bruno Ising, Culver Jordan, Cecil Cox, Joe L. Brown, and Elmer H. Tuttle, each of whom during that period of time was employed as a weighmaster at the stockyards and whose duty it was to determine correctly the weight of livestock weighed on scales at the stockyards, for the purpose and with the effect of compensating said weighmasters for recording weights on scale tickets showing the weight of cattle bought by respondent at less than the true and correct weight thereof and showing the weight of cattle sold by respondent at a weight greater than the true and correct weight thereof and said scale tickets were made a part of the records and memoranda kept by the operator of the stockyards. The respondent paid for cattle purchased by him and collected for cattle sold by him on the basis of the false weights shown on said scale tickets.

### CONCLUSIONS

The respondent, by making payments to weighmasters in return for favorable weights, clearly violated section 312 (a) of the act and caused false weight records to be made by the operator of the stockyards in violation of section 10 of the so-called Federal Trade Commission Act. The nature of the violations implies wilfulness. The effect of the practice of paying weighmasters was that respondent, when buying cattle, paid for less weight than he received and, when selling cattle, received payment for more weight than he delivered. The practice is dishonest and is a flagrant violation of the act which cannot be condemned too strongly.

The causing of false weight records to be made by the operator of the stockyards is also a serious violation. False information tends to conceal violations of the act and to mislead enforcement officials so that the enforcement of the act is seriously hampered and frustrated.

In view of the seriousness of the violations set forth a suspension of respondent's registration for a period of ten months coupled with a cease and desist order is warranted.

### ORDER

The respondent shall cease and desist from:

1. Engaging in unfair and deceptive practices and devices; and

2. Causing false entries to be made in the records of the operator of the stockyards.

The respondent's registration under the act is suspended for a period of ten months from the effective date hereof. A copy of this order shall be served upon the respondent and it shall become effective five days after service.

(No. 2377)

*In re* CHARLES J. SAILLER. P&S Doc. No. 1883. Decided March 22, 1950.

Same as 9 A. D. 306

*Mr. Elmer J. Scott* for complainant. *Mr. Chas. J. Sailer*, of Kansas City, Kansas, respondent *pro se*.

*Decision by Thomas J. Flavin, Judicial Officer*

#### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to as the act. The order of inquiry and notice of hearing, filed January 26, 1950, charges that respondent wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the act and wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the so-called Federal Trade Commission Act, which section is incorporated in and made a part of the Packers and Stockyards Act by section 402 of the latter act.

The respondent filed an answer on February 9, 1950, in which he admitted the facts alleged in the order of inquiry, waived the right to an oral hearing, and consented to the entry of an appropriate order without further notice.

#### FINDINGS OF FACT

1. At all times mentioned herein the respondent was registered with the Secretary of Agriculture as a dealer pursuant to the act to buy and sell cattle for his own account at the Kansas City Stock Yards, Kansas City, Missouri.

2. The Kansas City Stock Yards, Kansas City, Missouri, hereinafter referred to as the stockyards, at all times mentioned herein was a posted stockyard subject to the provisions of the act.

3. During the period from on or about January 1, 1944, to January 16, 1950, respondent paid certain sums of money at divers times to



Bruno Ising, Joe L. Brown, Frank E. Clark, Culver Jordan, Cecil Cox, Bart Fay, and Elmer H. Tuttle, each of whom during that period of time was employed as a weighmaster at the stockyards and whose duty it was to determine correctly the weight of livestock weighed on scales at the stockyards, for the purpose and with the effect of compensating said weighmasters for recording weights on the scale tickets showing the weight of cattle bought by respondent at less than the true and correct weight thereof and showing the weight of cattle sold by respondent at a weight greater than the true and correct weight thereof and said scale tickets were made a part of the records and memoranda kept by the operator of the stockyards. The respondent paid for cattle purchased by him and collected for cattle sold by him on the basis of the false weights shown on said scale tickets.

### CONCLUSIONS

The respondent, by making payments to weighmasters in return for favorable weights, clearly violated section 312 (a) of the act and caused false weight records to be made by the operator of the stockyards in violation of section 10 of the so-called Federal Trade Commission Act. The nature of the violations implies wilfulness. The effect of the practice of paying weighmasters was that respondent, when buying cattle, paid for less weight than he received, and when selling cattle, received payment for more weight than he delivered. The practice is dishonest and is a flagrant violation of the act which cannot be condemned too strongly.

The causing of false weight records to be made by the operator of the stockyards is also a serious violation. False information tends to conceal violations of the act and to mislead enforcement officials so that the enforcement of the act is seriously hampered and frustrated.

In view of the seriousness of the violations set forth a suspension of respondent's registration for a period of ten months coupled with a cease and desist order is warranted.

### ORDER

The respondent shall cease and desist from:

1. Engaging in unfair and deceptive practices and devices; and
2. Causing false entries to be made in the records of the operator of the stockyards.

The respondent's registration under the act is suspended for a period of ten months from the effective date hereof. A copy of this order shall be served upon the respondent and it shall become effective five days after service.

(No. 2378)

*In re* LESTER WOLFF, JR. P&S Doc. No. 1888. Decided March 22, 1950.

Same as 9 A. D. 306

*Mr. Elmer J. Scott* for complainant. *Mr. Lester Wolff, Jr. of Kansas City, Missouri*, respondent *pro se*.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to as the act. The order of inquiry and notice of hearing filed January 26, 1950, charges that respondent wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the act and wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the so-called Federal Trade Commission Act, which section is incorporated in and made a part of the Packers and Stockyards Act by section 402 of the latter act.

The respondent filed an answer on February 6, 1950, in which he admitted the facts alleged in the order of inquiry, waived the right to an oral hearing, and consented to the entry of an appropriate order without further notice.

### FINDINGS OF FACT

1. At all times mentioned herein the respondent was registered with the Secretary of Agriculture as a dealer pursuant to the act to buy and sell cattle for his own account at the Kansas City Stock Yards, Kansas City, Missouri.

2. The Kansas City Stock Yards, Kansas City, Missouri, hereinafter referred to as the stockyards, at all times mentioned herein was a posted stockyard subject to the provisions of the act.

3. During the period from on or about January 1, 1946, to January 16, 1950, respondent paid certain sums of money at divers times to Bart Fay, Frank E. Clark, Bruno Ising, Joe L. Brown, Cecil Cox and Culver Jordan, each of whom during that period of time was employed as a weighmaster at the stockyards and whose duty it was to determine correctly the weight of livestock weighed on scales at the stockyards, for the purpose and with the effect of compensating said weighmasters for recording weights on scale tickets showing the weight of cattle bought by respondent at less than the true and correct weight thereof and showing the weight of cattle sold by respondent at a weight greater

than the true and correct weight thereof and said scale tickets were made a part of the records and memoranda kept by the operator of the stockyards. The respondent paid for cattle purchased by him and collected for cattle sold by him on the basis of the false weights shown on said scale tickets.

### CONCLUSIONS

The respondent, by making payments to weighmasters in return for favorable weights, clearly violated section 312 (a) of the Act and caused false weight records to be made by the operator of the stockyards in violation of section 10 of the so-called Federal Trade Commission Act. The nature of the violations implies wilfulness. The effect of the practice of paying weighmasters was that respondent, when buying cattle, paid for less weight than he received and, when selling cattle, received payment for more weight than he delivered. The practice is dishonest and is a flagrant violation of the act which cannot be condemned too strongly.

The causing of false weight records to be made by the operator of the stockyards is also a serious violation. False information tends to conceal violations of the act and to mislead enforcement officials so that the enforcement of the act is seriously hampered and frustrated.

In view of the seriousness of the violations set forth, a suspension of respondent's registration for a period of ten months coupled with a cease and desist order is warranted.

### ORDER

The respondent shall cease and desist from :

1. Engaging in unfair and deceptive practices and devices ; and
2. Causing false entries to be made in the records of the operator of the stockyards.

The respondent's registration under the act is suspended for a period of ten months from the effective date hereof. A copy of this order shall be served upon the respondent and it shall become effective five days after service.

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(No. 2379)

*In re* ROSCOE L. WOODS. P&S Doc. No. 1889. Decided March 22, 1950.

Same as 9 A. D. 306

*Mr. Elmer J. Scott* for complainant. *Mr. Roscoe L. Woods*, of Kansas City, Missouri, respondent *pro se*.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to as the act. The order of inquiry and notice of hearing filed January 26, 1950, charges that respondent wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the act and wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the so-called Federal Trade Commission Act, which section is incorporated in and made a part of the Packers and Stockyards Act by section 402 of the latter act.

The respondent filed an answer on February 9, 1950, in which he admitted the facts alleged in the order of inquiry, waived the right to an oral hearing, and consented to the entry of an appropriate order without further notice. His answer also contains a statement with respect to his old age and poor health, which he asks be considered.

### FINDINGS OF FACT

1. At all times mentioned herein, the respondent was registered with the Secretary of Agriculture as a dealer pursuant to the act to buy and sell cattle for his own account at the Kansas City Stock Yards, Kansas City, Missouri.

2. The Kansas City Stock Yards, Kansas City, Missouri, hereinafter referred to as the stockyards, at all times mentioned herein was a posted stockyard subject to the provisions of the act.

3. During the period from on or about January 1, 1949, to January 17, 1950, respondent wilfully paid certain sums of money at divers times to Culver Jordan, Elmer H. Tuttle, Joe L. Brown, Bart Fay, Bruno Ising and Cecil Cox, each of whom during that period of time was employed as a weighmaster at the stockyards and whose duty it was to determine correctly the weight of livestock weighed on scales at the stockyards, for the purpose and with the effect of compensating said weighmasters for recording weights on scale tickets showing the weight of cattle bought by respondent at less than the true and correct weight thereof and showing the weight of cattle sold by respondent at a weight greater than the true and correct weight thereof and said scale tickets were made a part of the records and memoranda kept by the operator of the stockyards. The respondent paid for cattle purchased by him and collected for cattle sold by him on the basis of the false weights shown on said scale tickets.

### CONCLUSIONS

The respondent, by making payments to weighmasters in return for favorable weights, clearly violated section 312 (a) of the act and caused false weight records to be made by the operator of the stockyards in violation of section 10 of the so-called Federal Trade Commission Act. The nature of the violations implies wilfulness. The effect of the practice of paying weighmasters was that respondent, when buying cattle, paid for less weight than he received and, when selling cattle, received payment for more weight than he delivered. The practice is dishonest and is a flagrant violation of the act which cannot be condemned too strongly.

The causing of false weight records to be made by the operator of the stockyards is also a serious violation. False information tends to conceal violations of the act and to mislead enforcement officials so that the enforcement of the act is seriously hampered and frustrated.

In view of the seriousness of the violations set forth, a suspension of respondent's registration for a period of ten months coupled with a cease and desist order is warranted.

### ORDER

The respondent shall cease and desist from :

1. Engaging in unfair and deceptive practices and devices ; and
2. Causing false entries to be made in the records of the operator of the stockyards.

The respondent's registration under the act is suspended for a period of ten months from the effective date hereof. A copy of this order shall be served upon the respondent and it shall become effective five days after service.

(No. 2380)

*In re* JAMES P. FLYNN. P&S Doc. No. 1873. Decided March 22, 1950.

#### **Suspension of Registration—Violations of Act—Cease and Desist**

Inasmuch as respondent admitted the allegations that he wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the Packers and Stockyards Act, wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the Federal Trade Commission Act in connection with the paying of employed weighmasters at the stockyards for favorable but false weights on cattle bought and sold by respondent, and wilfully gave false information to representatives of the Secretary of Agriculture concerning his dealer operations at the stockyards in violation of section 201.88 of the regulations issued under the Packers and Stockyards Act, the respondent's registration

is suspended for a period of one year and he is ordered to cease and desist from committing the violations of the act and the regulations issued thereunder.\*

*Mr. Elmer J. Scott* for complainant. *Mr. James P. Flynn*, of Kansas City, Missouri, respondent *pro se*.

*Decision by Thomas J. Flavin, Judicial Officer*

#### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to as the act. The order of inquiry and notice of hearing, filed January 26, 1950, charges that respondent wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the act, wilfully gave false information to representatives of the Secretary of Agriculture in violation of section 201.88 of the regulations issued pursuant to the act, and wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the so-called Federal Trade Commission Act, which section is incorporated in and made a part of the Packers and Stockyards Act by section 402 of the latter act.

The respondent filed an answer on February 8, 1950, in which he made certain admissions and in a supplemental answer, filed February 27, 1950, the respondent admitted the facts alleged in the order of inquiry, waived an oral hearing, and consented to the entry of an appropriate order without further notice.

#### FINDINGS OF FACT

1. At all times mentioned herein, the respondent was registered with the Secretary of Agriculture as a dealer pursuant to the act to buy and sell cattle for his own account at the Kansas City Stock Yards, Kansas City, Missouri.

2. The Kansas City Stock Yards, Kansas City, Missouri, hereinafter referred to as the stockyards, at all times mentioned herein was a posted stockyard subject to the provisions of the act.

3. During the period from on or about March 1, 1949, to January 18, 1950, the respondent paid certain sums of money at divers times to Bruno Ising, Joe Brown, Culver Jordon, Cecil Cox and William Miller, each of whom during that period of time was employed as a weighmaster at the stockyards and whose duty it was to determine correctly the weight of livestock weighed on scales at the stockyards, for the purpose and with the effect of inducing said weighmasters

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

to record weights on scale tickets showing the weight of cattle bought by respondent at less than the true and correct weight thereof and showing the weight of cattle sold by respondent at a weight greater than the true and correct weight thereof and said scale tickets were made a part of the records and memoranda kept by the operator of the stockyards. The respondent paid for cattle purchased by him and collected for cattle sold by him on the basis of the false weights shown on said scale tickets.

4. On or about January 18, 1950, the respondent during an interview with Kenneth A. Potter and Donald L. Bowman, authorized agents of the Secretary of Agriculture, in response to questions from such agents wilfully gave false information to said agents concerning the dealer operations of the respondent and the weighing of respondent's cattle at the stockyards. Thereafter, on January 19, 1950, the respondent, in response to further questioning, gave said agents true and correct information concerning his dealer operations and the weighing of his cattle at the stockyards.

#### CONCLUSIONS

The respondent, by making payments to weighmasters in return for favorable weights clearly violated section 312 (a) of the act and caused false weight records to be made by the operator of the stockyards in violation of section 10 of the so-called Federal Trade Commission Act. The nature of the violations implies wilfulness. The effect of the practice of paying weighmasters was that respondent, when buying cattle, paid for less weight than he received and, when selling cattle, received payment for more weight than he delivered. The practice is dishonest and is a flagrant violation of the act which cannot be too strongly condemned.

The making of false statements to agents of the Secretary during the course of an investigation was a violation of section 201.88 of the regulations. The successful enforcement of a regulatory statute depends in a large measure on the reliability of the information furnished by those subject to the provisions of the statute. False information tends to conceal violations of a statute and to mislead enforcement officials so that the enforcement of the statute is seriously hampered and frustrated. Congress apparently recognized that fact because the most severe criminal penalty for which it made provision in the act applies to the keeping of false records and the making of false reports.

In view of the seriousness of the violations set forth, a year's suspension of respondent's registration is warranted, in addition to a cease and desist order.

**ORDER**

The respondent shall cease and desist from :

- (1) engaging in unfair and deceptive practices and devices;
- (2) causing false entries to be made in the records of the operator of the stockyards; and
- (3) giving false information concerning his dealer operations at the stockyards to representatives of the Secretary of Agriculture charged with responsibility for enforcement of the act.

The respondent's registration under the act is suspended for a period of one year from the effective date hereof. A copy of this order shall be served upon the respondent and it shall become effective five days after service.

(No. 2381)

*In re* I. A. HAHN. P&S Doc. No. 1876. Decided March 22, 1950.

Same as 9 A. D. 324

*Mr. Elmer J. Scott* for complainant. *Mr. I. A. Hahn*, of Parkville, Missouri, respondent *pro se*.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to as the act. The order of inquiry and notice of hearing, filed January 26, 1950, charges that respondent wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the act, wilfully gave false information to representatives of the Secretary of Agriculture in violation of section 201.88 of the regulations issued pursuant to the act, and wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the so-called Federal Trade Commission Act, which section is incorporated in and made a part of the Packers and Stockyards Act by section 402 of the latter act.

The respondent filed an answer on February 9, 1950, in which he admitted the facts alleged in the order of inquiry, waived an oral hearing, and consented to the entry of an appropriate order without further notice.

**FINDINGS OF FACT**

1. At all times mentioned herein, the respondent was registered with the Secretary of Agriculture as a dealer pursuant to the act to



buy and sell cattle for his own account at the Kansas City Stock Yards, Kansas City, Missouri.

2. The Kansas City Stock Yards, Kansas City, Missouri, hereinafter referred to as the stockyards, at all times mentioned herein was a posted stockyard subject to the provisions of the act.

3. During the period from on or about January 1, 1948, to January 18, 1950, with respect to William E. Miller, Cecil Cox, Bruno Ising, Joe L. Brown, Elmer Tuttle, Bart Fay and during the period from on or about July 1, 1949, to January 18, 1950, with respect to Frank E. Clark, the respondent paid certain sums of money at divers times to the said William E. Miller, Cecil Cox, Bruno Ising, Joe L. Brown, Elmer Tuttle, Bart Fay and Frank E. Clark, each of whom during the above-mentioned periods of time was employed as a weighmaster at the stockyards and whose duty it was to determine correctly the weight of livestock weighed on scales at the stockyards, for the purpose and with the effect of compensating said weighmasters for recording weights on scale tickets showing the weight of cattle bought by respondent at less than the true and correct weight thereof and showing the weight of cattle sold by respondent at a weight greater than the true and correct weight thereof and said scale tickets were made a part of the records and memoranda kept by the operator of the stockyards. The respondent paid for cattle purchased by him and collected for cattle sold by him on the basis of the false weights shown on said scale tickets.

4. On or about January 18, 1950, the respondent during an interview with Glenn Bierman and Charles Sercer, authorized agents of the Secretary of Agriculture, in response to questions from such agents wilfully gave false information to said agents concerning the dealer operations of the respondent and the weighing of respondent's cattle at the stockyards. Thereafter on January 19, 1950, the respondent, in response to further questioning, gave said agents true and correct information concerning his dealer operations and the weighing of his cattle at the stockyards.

#### CONCLUSIONS

The respondent, by making payments to weighmasters in return for favorable weights clearly violated section 312 (a) of the act and caused false weight records to be made by the operator of the stockyards in violation of section 10 of the so-called Federal Trade Commission Act. The nature of the violations implies wilfulness. The effect of the practice of paying weighmasters was that respondent, when buying cattle, paid for less weight than he received and, when selling cattle, received payment for more weight than he delivered.

The practice is dishonest and is a flagrant violation of the act which cannot be too strongly condemned.

The making of false statements to agents of the Secretary during the course of an investigation was a violation of section 201.88 of the regulations. The successful enforcement of a regulatory statute depends in a large measure on the reliability of the information furnished by those subject to the provisions of the statute. False information tends to conceal violations of a statute and to mislead enforcement officials so that the enforcement of the statute is seriously hampered and frustrated. Congress apparently recognized that fact because the most severe criminal penalty for which it made provision in the act applies to the keeping of false records and the making of false reports.

In view of the seriousness of the violations set forth, a year's suspension of respondent's registration is warranted, in addition to a cease and desist order.

#### ORDER

The respondent shall cease and desist from:

- (1) engaging in unfair and deceptive practices and devices;
- (2) causing false entries to be made in the records of the operator of the stockyards; and
- (3) giving false information concerning his dealer operations at the stockyards to representatives of the Secretary of Agriculture charged with responsibility for enforcement of the act.

The respondent's registration under the act is suspended for a period of one year from the effective date hereof. A copy of this order shall be served upon the respondent and it shall become effective five days after service.

(No. 2382)

*In re* LAWRENCE SANDERS. P&S Doc. No. 1884. Decided March 22, 1950.

Same as 9 A. D. 324

*Mr. Elmer J. Scott* for complainant. *Mr. Lawrence Sanders*, of Kansas City, Missouri, respondent *pro se*.

*Decision by Thomas J. Flavin, Judicial Officer*

#### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to

as the act. The order of inquiry and notice of hearing, filed January 26, 1950, charges that respondent wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the act, wilfully gave false information to representatives of the Secretary of Agriculture in violation of section 201.88 of the regulations issued pursuant to the act, and wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the so-called Federal Trade Commission Act, which section is incorporated in and made a part of the Packers and Stockyards Act by section 402 of the latter act.

The respondent filed an answer on February 8, 1950, in which he admitted the facts alleged in the order of inquiry, waived oral hearing, and consented to the entry of an appropriate order without further notice.

#### FINDINGS OF FACT

1. At all times mentioned herein, the respondent was registered with the Secretary of Agriculture as a dealer pursuant to the act to buy and sell cattle for his own account at the Kansas City Stock Yards, Kansas City, Missouri.

2. The Kansas City Stock Yards, Kansas City, Missouri, hereinafter referred to as the stockyards, at all times mentioned herein was a posted stockyard subject to the provisions of the act.

3. During the period from on or about January 1, 1949, to January 16, 1950, respondent paid certain sums of money at divers times to Bruno Ising, Joe L. Brown, Frank E. Clark and Culver Jordan, each of whom during that period of time was employed as a weighmaster at the stockyards and whose duty it was to determine correctly the weight of livestock weighed on scales at the stockyards, for the purpose and with the effect of compensating said weighmasters for recording weights on scale tickets showing the weight of cattle bought by respondent at less than the true and correct weight thereof and showing the weight of cattle sold by respondent at a weight greater than the true and correct weight thereof and said scale tickets were made a part of the records and memoranda kept by the operator of the stockyards. The respondent paid for cattle purchased by him and collected for cattle sold by him on the basis of the false weights shown on said scale tickets.

4. On or about January 16, 1950, the respondent during an interview with Kenneth A. Potter and Donald L. Bowman, authorized agents of the Secretary of Agriculture, in response to questions from such agents wilfully gave false information to said agents concerning the dealer operations of the respondent and the weighing of respond-

ent's cattle at the stockyards. Thereafter, on January 19, 1950, the respondent, in response to further questioning, gave said agents true and correct information concerning his dealer operations and the weighing of his cattle at the stockyards.

### CONCLUSIONS

The respondent, by making payments to weighmasters in return for favorable weights clearly violated section 312 (a) of the act and caused false weight records to be made by the operator of the stockyards in violation of section 10 of the so-called Federal Trade Commission Act. The nature of the violations implies wilfulness. The effect of the practice of paying weighmasters was that respondent, when buying cattle, paid for less weight than he received and, when selling cattle, received payment for more weight than he delivered. The practice is dishonest and is a flagrant violation of the act which cannot be too strongly condemned.

The making of false statements to agents of the Secretary during the course of an investigation was a violation of section 201.88 of the regulations. The successful enforcement of a regulatory statute depends in a large measure on the reliability of the information furnished by those subject to the provisions of the statute. False information tends to conceal violations of a statute and to mislead enforcement officials so that the enforcement of the statute is seriously hampered and frustrated. Congress apparently recognized that fact because the most severe criminal penalty for which it made provision in the act applies to the keeping of false records and the making of false reports.

In view of the seriousness of the violations set forth, a year's suspension of respondent's registration is warranted, in addition to a cease and desist order.

### ORDER

The respondent shall cease and desist from:

- (1) engaging in unfair and deceptive practices and devices;
- (2) causing false entries to be made in the records of the operator of the stockyards; and
- (3) giving false information concerning his dealer operations at the stockyards to representatives of the Secretary of Agriculture charged with responsibility for enforcement of the act.

The respondent's registration under the act is suspended for a period of one year from the effective date hereof.

A copy of this order shall be served upon the respondent and it shall become effective five days after service.

(No. 2383)

*In re* JOHN C. SMITH. P&S Doc. No. 1885. Decided March 22, 1950.

Same as 9 A. D. 324

*Mr. Elmer J. Scott* for complainant. *Mr. John C. Smith*, of Kansas City, Missouri, respondent *pro se*.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to as the act. The order of inquiry and notice of hearing, filed January 28, 1950, charges that respondent wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the act, wilfully gave false information to representatives of the Secretary of Agriculture in violation of section 201.88 of the regulations issued pursuant to the act, and wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the so-called Federal Trade Commission Act, which section is incorporated in and made a part of the Packers and Stockyards Act by section 402 of the latter act.

The respondent filed an answer on February 8, 1950, in which he admitted the facts alleged in the order of inquiry, waived an oral hearing, and consented to the entry of an appropriate order without further notice.

### FINDINGS OF FACT

1. At all times mentioned herein the respondent was registered with the Secretary of Agriculture as a dealer pursuant to the act to buy and sell cattle for his own account at the Kansas City Stock Yards, Kansas City, Missouri.

2. The Kansas City Stock Yards, Kansas City, Missouri, hereinafter referred to as the stockyards, at all times mentioned herein was a posted stockyard subject to the provisions of the act.

3. During the period from on or about January 1, 1945, to January 16, 1950, respondent paid certain sums of money at divers times to Culver Jordan, Cecil Cox, Joe L. Brown, Bart Fay, Elmer H. Tuttle, Bruno Ising, and William E. Miller, each of whom during that period of time was employed as a weighmaster at the stockyards and whose duty it was to determine correctly the weight of livestock weighed on scales at the stockyards, for the purpose and with the effect of compensating said weighmasters for recording weights on scale

tickets showing the weight of cattle bought by respondent at less than the true and correct weight thereof and showing the weight of cattle sold by respondent at a weight greater than the true and correct weight thereof and said scale tickets were made a part of the records and memoranda kept by the operator of the stockyards. The respondent paid for cattle purchased by him and collected for cattle sold by him on the basis of the false weights shown on said scale tickets.

4. On or about January 16, 1950, the respondent during an interview with Lee D. Sinclair and W. C. Ball, authorized agents of the Secretary of Agriculture, in response to questions from such agents willfully gave false information to said agents concerning the dealer operations of the respondent and the weighing of respondent's cattle at the stockyards. Thereafter on January 19, 1950, the respondent, in response to further questioning, gave said agents true and correct information concerning his dealer operations and the weighing of his cattle at the stockyards.

#### CONCLUSIONS

The respondent, by making payments to weighmasters in return for favorable weights clearly violated section 312 (a) of the act and caused false weight records to be made by the operator of the stockyards in violation of section 10 of the so-called Federal Trade Commission Act. The nature of the violations implies wilfulness. The effect of the practice of paying weighmasters was that respondent, when buying cattle, paid for less weight than he received and, when selling cattle, received payment for more weight than he delivered. The practice is dishonest and is a flagrant violation of the act which cannot be too strongly condemned.

The making of false statements to agents of the Secretary during the course of an investigation was a violation of section 201.88 of the regulations. The successful enforcement of a regulatory statute depends in a large measure on the reliability of the information furnished by those subject to the provisions of the statute. False information tends to conceal violations of a statute and to mislead enforcement officials so that the enforcement of the statute is seriously hampered and frustrated. Congress apparently recognized that fact because the most severe criminal penalty for which it made provision in the act applies to the keeping of false records and the making of false reports.

In view of the seriousness of the violations set forth, a year's suspension of respondent's registration is warranted, in addition to a cease and desist order.

**ORDER**

The respondent shall cease and desist from:

- (1) engaging in unfair and deceptive practices and devices;
- (2) causing false entries to be made in the records of the operator of the stockyards; and
- (3) giving false information concerning his dealer operations at the stockyards to representatives of the Secretary of Agriculture charged with responsibility for enforcement of the act.

The respondent's registration under the act is suspended for a period of one year from the effective date hereof. A copy of this order shall be served upon the respondent and it shall become effective five days after service.

(No. 2384)

*In re* MIKE SMITH. P&S Doc. No. 1891. Decided March 22, 1950.

Same as 9 A. D. 324

*Mr. Elmer J. Scott* for complainant. *Mr. Mike Smith*, of Kansas City, Missouri, respondent *pro se*.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to as the act. The order of inquiry and notice of hearing, filed January 26, 1950, charges that respondent wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the act, wilfully gave false information to representatives of the Secretary of Agriculture in violation of section 201.88 of the regulations issued pursuant to the act, and wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the so-called Federal Trade Commission Act, which section is incorporated in and made a part of the Packers and Stockyards Act by section 402 of the latter act.

The respondent filed an answer on February 7, 1950, in which he admitted the facts alleged in the order of inquiry, waived an oral hearing, and consented to the entry of an appropriate order without further notice.

### FINDINGS OF FACT

1. At all times mentioned herein, the respondent was registered with the Secretary of Agriculture as a dealer pursuant to the act to buy and sell cattle for his own account at the Kansas City Stock Yards, Kansas City, Missouri.

2. The Kansas City Stock Yards, Kansas City, Missouri, hereinafter referred to as the stockyards, at all times mentioned herein was a posted stockyard subject to the provisions of the act.

3. During the period from on or about January 1, 1946, to January 18, 1950, respondent paid certain sums of money at divers times to Cecil Cox, William E. Miller, Bruno Ising, Joe L. Brown, Bart Fay, Elmer H. Tuttle, and Frank E. Clark, each of whom during that period of time was employed as a weighmaster at the stockyards and whose duty it was to determine correctly the weight of livestock weighed on scales at the stockyards, for the purpose and with the effect of compensating said weighmasters for recording weights on scale tickets showing the weight of cattle bought by respondent at less than the true and correct weight thereof and showing the weight of cattle sold by respondent at a weight greater than the true and correct weight thereof and said scale tickets were made a part of the records and memoranda kept by the operator of the stockyards. The respondent paid for cattle purchased by him and collected for cattle sold by him on the basis of the false weights shown on said scale tickets.

4. On or about January 18, 1950, the respondent during an interview with M. J. Cook and John Clendenin and during an interview with C. L. Richard, and Charles B. Jennings, authorized agents of the Secretary of Agriculture, in response to questions from such agents wilfully gave false information to said agents concerning the dealer operations of the respondent and the weighing of respondent's cattle at the stockyards. Thereafter on January 19, 1950, in response to further questioning the respondent gave the said Charles Jennings and C. L. Richard true and correct information concerning his dealer operations and the weighing of his cattle at the stockyards.

### CONCLUSIONS

The respondent, by making payments to weighmasters in return for favorable weights clearly violated section 312 (a) of the act and caused false weight records to be made by the operator of the stockyards in violation of section 10 of the so-called Federal Trade Commission Act. The nature of the violations implies wilfulness. The effect of the practice of paying weighmasters was that respondent, when buying cattle, paid for less weight than he received and, when



selling cattle, received payment for more weight than he delivered. The practice is dishonest and is a flagrant violation of the act which cannot be too strongly condemned.

The making of false statements to agents of the Secretary during the course of an investigation was a violation of section 201.88 of the regulations. The successful enforcement of a regulatory statute depends in a large measure on the reliability of the information furnished by those subject to the provisions of the statute. False information tends to conceal violations of a statute and to mislead enforcement officials so that the enforcement of the statute is seriously hampered and frustrated. Congress apparently recognized that fact because the most severe criminal penalty for which it made provision in the act applies to the keeping of false records and the making of false reports.

In view of the seriousness of the violations set forth, a year's suspension of respondent's registration is warranted, in addition to a cease and desist order.

#### ORDER

The respondent shall cease and desist from :

- (1) engaging in unfair and deceptive practices and devices;
- (2) causing false entries to be made in the records of the operator of the stockyards; and
- (3) giving false information concerning his dealer operations at the stockyards to representatives of the Secretary of Agriculture charged with responsibility for enforcement of the act.

The respondent's registration under the act is suspended for a period of one year from the effective date hereof. A copy of this order shall be served upon the respondent and it shall become effective five days after service.

(No. 2385)

*In re* L. F. TUCKER. P&S Doc. No. 1887. Decided March 22, 1950.

Same as 9 A. D. 324

*Mr. Elmer J. Scott* for complainant. *Mr. L. F. Tucker*, of Kansas City, Missouri, respondent *pro se*.

*Decision by Thomas J. Flavin, Judicial Officer*

#### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to as the act. The order of inquiry and notice of hearing, filed January

26, 1950, charges that respondent wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the act, wilfully gave false information to representatives of the Secretary of Agriculture in violation of section 201.88 of the regulations issued pursuant to the act, and wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the so-called Federal Trade Commission Act, which section is incorporated in and made a part of the Packers and Stockyards Act by section 402 of the latter act.

The respondent filed an answer on February 6, 1950, in which he admitted the facts alleged in the order of inquiry, waived an oral hearing, and consented to the entry of an appropriate order without further notice.

#### FINDINGS OF FACT

1. At all times mentioned herein, the respondent was registered with the Secretary of Agriculture as a dealer pursuant to the act to buy and sell cattle for his own account at the Kansas City Stock Yards, Kansas City, Missouri.

2. The Kansas City Stock Yards, Kansas City, Missouri, herein-after referred to as the stockyards, at all times mentioned herein was a posted stockyard subject to the provisions of the act.

3. During the period from on or about January 1, 1948, to January 18, 1950, the respondent paid certain sums of money at divers times to Bruno Ising, Culver Jordan, Cecil Cox, Frank E. Clark, Joe L. Brown, Bart Fay, and Elmer H. Tuttle, each of whom during that period of time was employed as a weighmaster at the stockyards and whose duty it was to determine correctly the weight of livestock weighed on scales at the stockyards, for the purpose and with the effect of compensating said weighmasters for recording weights on scale tickets showing the weight of cattle bought by respondent at less than the true and correct weight thereof and showing the weight of cattle sold by respondent at a weight greater than the true and correct weight thereof and said scale tickets were made a part of the records and memoranda kept by the operator of the stockyards. The respondent paid for cattle purchased by him and collected for cattle sold by him on the basis of the false weights shown on said scale tickets.

4. On or about January 18, 1950, the respondent, during an interview with Charles B. Jennings and C. L. Richard, authorized agents of the Secretary of Agriculture, in response to questions from such agents wilfully gave false information to said agents concerning the dealer operations of the respondent and the weighing of respondent's cattle at the stockyards. Thereafter on January 19, 1950, the re-

spondent, in response to further questioning, gave said agents true and correct information concerning his dealer operations and the weighing of his cattle at the stockyards.

### CONCLUSIONS

The respondent, by making payments to weighmasters in return for favorable weights clearly violated section 312 (a) of the act and caused false weight records to be made by the operator of the stockyards in violation of section 10 of the so-called Federal Trade Commission Act. The nature of the violations implies wilfulness. The effect of the practice of paying weighmasters was that respondent, when buying cattle, paid for less weight than he received and, when selling cattle, received payment for more weight than he delivered. The practice is dishonest and is a flagrant violation of the act which cannot be too strongly condemned.

The making of false statements to agents of the Secretary during the course of an investigation was a violation of section 201.88 of the regulations. The successful enforcement of a regulatory statute depends in a large measure on the reliability of the information furnished by those subject to the provisions of the statute. False information tends to conceal violations of a statute and to mislead enforcement officials so that the enforcement of the statute is seriously hampered and frustrated. Congress apparently recognized that fact because the most severe criminal penalty for which it made provision in the act applies to the keeping of false records and the making of false reports.

In view of the seriousness of the violations set forth, a year's suspension of respondent's registration is warranted, in addition to a cease and desist order.

### ORDER

The respondent shall cease and desist from :

- (1) engaging in unfair and deceptive practices and devices;
- (2) causing false entries to be made in the records of the operator of the stockyards; and
- (3) giving false information concerning his dealer operations at the stockyards to representatives of the Secretary of Agriculture charged with responsibility for enforcement of the act.

The respondent's registration under the act is suspended for a period of one year from the effective date hereof. A copy of this order shall be served upon the respondent and it shall become effective five days after service.

(No. 2386)

*In re* WM. J. WOODS AND E. J. HEINS, D. B. A. WOODS & HEINS. P&S  
Doc. No. 1890. Decided March 22, 1950.

Same as 9 A. D. 324

*Mr. Elmer J. Scott* for complainant. *Messrs. William J. Woods and E. J. Heins*,  
of Kansas City, Missouri, respondents *pro se*.

*Decision by Thomas J. Flavin, Judicial Officer*

#### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to as the act. The order of inquiry and notice of hearing, filed January 26, 1950, charges that respondents wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the act, wilfully gave false information to representatives of the Secretary of Agriculture in violation of section 201.88 of the regulations issued pursuant to the act, and wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the so-called Federal Trade Commission Act, which section is incorporated in and made a part of the Packers and Stockyards Act by section 402 of the latter act.

Respondent, William J. Woods, filed an answer on February 9, 1950, and respondent, E. J. Heins, filed an answer on March 10, 1950. Both respondents admitted the facts alleged in the order of inquiry, waived the right to an oral hearing, and consented to the entry of an appropriate order without further notice.

#### FINDINGS OF FACT

1. At all times mentioned herein, the respondents were registered with the Secretary of Agriculture as dealers pursuant to the act to buy and sell cattle for their own account at the Kansas City Stock Yards, Kansas City, Missouri.

2. The Kansas City Stock Yards, Kansas City, Missouri, hereinafter referred to as the stockyards, at all times mentioned herein was a posted stockyard subject to the provisions of the act.

3. During the period from on or about January 1, 1947, to January 18, 1950, respondents paid certain sums of money at divers times to Culver Jordan, Joe L. Brown, and Bruno Ising, each of whom during that period of time was employed as a weighmaster at the stockyards and whose duty it was to determine correctly the weight of livestock weighed on scales at the stockyards, for the purpose and with the effect

of compensating said weighmasters for recording weights on scale tickets showing the weight of cattle bought by respondents at less than the true and correct weight thereof and showing the weight of cattle sold by respondents at a weight greater than the true and correct weight thereof and said scale tickets were made a part of the records and memoranda kept by the operator of the stockyards. The respondents paid for cattle purchased by them and collected for the cattle sold by them on the basis of the false weights shown on said scale tickets.

4. On or about January 18, 1950, respondent Wm. J. Woods, during an interview with Lee D. Sinclair and Wm. C. Ball, authorized agents of the Secretary of Agriculture, in response to questions from such agents wilfully gave false information to said agents concerning the dealer operations of the respondents and the weighing of respondents' cattle at the stockyards. Thereafter, on January 19, 1950, respondent Wm. J. Woods, in response to further questioning, gave said agents true and correct information concerning respondents' dealer operations and the weighing of their cattle at the stockyards.

### CONCLUSIONS

The respondents, by making payments to weighmasters in return for favorable weights clearly violated section 312 (a) of the act and caused false weight records to be made by the operator of the stockyards in violation of section 10 of the so-called Federal Trade Commission Act. The nature of the violations implies wilfulness. The effect of the practice of paying weighmasters was that respondents, when buying cattle, paid for less weight than they received and, when selling cattle, received payment for more weight than they delivered. The practice is dishonest and is a flagrant violation of the act which cannot be too strongly condemned.

The making of false statements to agents of the Secretary during the course of an investigation was a violation of section 201.88 of the regulations. The successful enforcement of a regulatory statute depends in a large measure on the reliability of the information furnished by those subject to the provisions of the statute. False information tends to conceal violations of a statute and to mislead enforcement officials so that the enforcement of the statute is seriously hampered and frustrated. Congress apparently recognized that fact because the most severe criminal penalty for which it made provision in the act applies to the keeping of false records and the making of false reports.

In view of the seriousness of the violations set forth, a year's suspension of respondents' registration is warranted, in addition to a cease and desist order.

**ORDER**

The respondents shall cease and desist from:

- (1) engaging in unfair and deceptive practices and devices;
- (2) causing false entries to be made in the records of the operator of the stockyards; and
- (3) giving false information concerning their dealer operations at the stockyard to representatives of the Secretary of Agriculture charged with responsibility for enforcement of the act.

The respondents' registration under the act is suspended for a period of one year from the effective date hereof. A copy of this order shall be served upon each respondent and it shall become effective five days after service.

(No. 2387)

**A. E. BULLER v. ALBERT SKLARZ AND/OR PHILIP SKLARZ, SUN GLO FRUIT AND PRODUCE COMPANY, MRS. E. LINDSAY AND/OR WILLIAM ZWILLINGER. PACA Doc. No. 4750. Decided March 6, 1950.**

**Dismissal—Failure To Mitigate Damages—F. o. b. Shipment of Onions Meeting Contract Requirements—Rejection Without Reasonable Cause—Failure To Take Reasonable Steps To Mitigate Damages**

Where it is shown by shipping point inspection certificates covering certain f. o. b. shipments of onions that the onions met contract requirements as to grade, it is held, that respondent-buyer's rejection of the onions was without reasonable cause and in violation of the act but since complainant failed in his duty to take reasonable steps to mitigate the damages following the buyer's rejection of the onions, which were subsequently abandoned to the railroad by complainant's broker, and there is no evidence to show that the action of the broker in abandoning the onions to the carrier was reasonable in the circumstances, it is held, that there is no basis for an award of reparation to complainant in connection with the onions in question.

**Damages—Evidence—Exhibits Not Acceptable as Proof of Damages, When—Dismissal of Complaint**

Where complainant-seller, seeking an award of reparation in connection with certain shipments of onions purchased by respondent-buyer who rejected the onions upon arrival, attempted to establish his loss by copies of accountings attached to the complaint in exhibit form, which exhibits were not offered or received in evidence at the hearing, and complainant failed to answer in his deposition questions regarding resale of the onions, amounts of proceeds received, etc., it is held, that the exhibits attached to the complaint properly form a part of the pleadings, but this does not make them competent or admissible as proof, such exhibits are not a part of the evidence in a hearing case unless formally offered and received in evidence at the hearing, and, in the absence of acceptable proof of loss, complainant is not entitled to an award of reparation and the complaint should be dismissed.

**Contract of Purchase and Sale—Evidence Establishing Valid Contract**

Where respondent S denied entering into a contract with complainant for the purchase of onions and contended that his agreement was with respondent L, but the weight of the evidence shows that L acted as a broker in finding a buyer for complainant, it is held, that respondent S made a valid legal contract with complainant for the purchase of seven carloads of onions.

**F. o. b. Acceptance Final Contract—Clear and Convincing Evidence**

Where complainant-seller contended that the contract for the purchase and sale of certain onions was on an f. o. b. acceptance final basis and called for 85 percent U. S. No. 1 or better onions, which was denied by respondent-buyer who promptly objected to the phrase "acceptance final" in the broker's confirming telegram, and the record contains no further supporting evidence of complainant's contention that the contract was on an acceptance final basis, it is held, that to establish an acceptance final contract the evidence must be clear and convincing on that point, the contract is assumed to be on an f. o. b. shipping point basis, and it is further held that the evidence is sufficient to establish that the contract was for 85 percent U. S. No. 1 or better onions, rather than for U. S. No. 1 medium size, as contended by respondent-buyer.

**Dismissal of Counterclaim—Failure To Comply With Limitation Period—Lack of Jurisdiction**

The counterclaim of respondent-broker seeking to recover brokerage fees on cars shipped and billed out by her is dismissed for lack of jurisdiction since it was not filed within nine months from the time the alleged cause of action accrued.

*Mr. A. Peter Ohannesson*, of Shafter, California, for complainant. *Mr. Ned Stein*, of Philadelphia, Pennsylvania, for respondents Albert and Philip Sklarz. *Mr. Charles Chorna*, of Los Angeles, California, for respondent Mrs. E. Lindsay. *Messrs. Roberts & Campbell*, of El Centro, California, for respondent William Zwillingler. *Mr. James A. O'Donnell*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a proceeding for the recovery of reparation under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed., 499a *et seq.*), in which formal complaint was filed on November 18, 1946. All respondents, except Albert Sklarz, were served by registered mail with copies of the complaint and a report of investigation compiled by the Regulatory Division of the Fruit and Vegetable Branch.

It is alleged in the formal complaint that on or about June 7, 1946, complainant sold to respondents, Philip Sklarz and/or Albert Sklarz, through respondent-broker, Mrs. E. Lindsay, seven carloads of onions at the agreed price of \$2 per 50-pound sack, said onions to grade 85 percent or better U. S. No. 1, f. o. b. net, California Acceptance Final, shipping point Shafter, California, destination Philadelphia, Penn-

sylvania. It is also alleged that respondent, Philip Sklarz, accepted and paid for the first two carloads of onions shipped; that of the remaining five carloads, respondent Philip Sklarz refused to accept and pay the agreed purchase price of \$2,400 for two cars; and that upon said respondent's refusal to accept the other three cars, the onions were resold at a loss to complainant of \$2,464.35. Complainant seeks reparation in the total amount of \$4,864.35.

Respondents, Philip Sklarz and Albert Sklarz, filed an answer on May 20, 1947, denying generally the allegations of the complaint. By way of further answer, it is averred that Philip Sklarz ordered 10 cars of U. S. No. 1 medium size onions, to be shipped at the rate of two cars per day from the Sun-Glo Fruit and Produce Company, the owner of which was understood to be respondent, Mrs. E. Lindsay; that nine cars of onions, including two of the cars referred to in the complaint, were accepted and paid for by Philip Sklarz; and that two additional cars, also referred to in the complaint, were refused by Philip Sklarz because the onions were not as warranted and were in excess of the number of cars originally purchased.

On May 27, 1947, respondent, William Zwilling, answered the complaint, denying that he was at any time a partner of respondent, Mrs. E. Lindsay, or that he was a partner or member of a partnership transacting business under the name of Sun-Glo Fruit and Produce Company.

On June 13, 1947, respondent, Mrs. E. Lindsay, filed an answer and cross-complaint. It is alleged in the answer that this respondent is the sole owner and operator of the Sun-Glo Fruit and Produce Company. This respondent denied inspecting complainant's field of onions. She also denied that Albert Sklarz offered to purchase the onions through her. She alleges that Albert Sklarz contracted directly with complainant's son for the purchase of seven cars of onions. As a separate defense, it is contended that the complaint fails to state facts sufficient to constitute a cause of action against Mrs. E. Lindsay. It is alleged in the cross-complaint that Mrs. E. Lindsay acted as broker for complainant, A. E. Buller, in selling seven carloads of onions to respondent, Philip Sklarz; that she received her brokerage fee of 10 cents per bag on two of the cars from Mr. Buller, who has since failed and refused to pay the agreed brokerage on the remaining five cars. The cross-complaint asks for reparation in the amount of \$300 to cover brokerage allegedly due Mrs. E. Lindsay from the complainant. In answer to the cross-complaint, A. E. Buller denies that there is due and owing to Mrs. E. Lindsay any sum of money whatever.

An oral hearing was held at Philadelphia, Pennsylvania, on April 26, 1949. Respondent, Philip Sklarz, appeared and testified and was



represented by counsel at the hearing. Neither the complainant nor respondents, Albert Sklarz, Mrs. E. Lindsay or William Zwillinger, appeared or were represented at the hearing. The depositions of complainant witnesses, A. E. Buller and Dale Buller, and of respondents Mrs. E. Lindsay and Albert Sklarz, all previously taken pursuant to proper orders, were received in evidence. On June 15, 1949, respondent, William Zwillinger, filed a motion to dismiss the complaint against him for want of jurisdiction on the grounds that the complaint does not set forth a cause of action against him, nor was there any evidence adduced at the hearing to support a judgment against him.

#### FINDINGS OF FACT

1. Complainant, A. E. Buller, is an individual whose post office address is Shafter, California. Complainant is a grower, and is not licensed or subject to license under the act.

2. Respondent, William Zwillinger, is an individual whose post office address is 323 North Curson Avenue, Los Angeles, California.

3. Respondent, Mrs. E. Lindsay, is an individual doing business as the Sun-Glo Fruit and Produce Company, whose post office address is 316 Mason Building, Fresno, California. At the time of the transaction here involved, this respondent was licensed under the act as owner of the Eliene Lindsay Fruit Company of Culver City, California.

4. Respondent, Philip Sklarz, is an individual whose post office address is 106-109 Dock Street, Philadelphia, Pennsylvania.

5. Respondent, Albert Sklarz, is an individual whose post office address is 411 Dayton Street, Fresno, California. At the time of the transaction involved herein, Albert Sklarz was not licensed or subject to license under the act.

6. At the time of the transaction involved in this proceeding, respondents William Zwillinger and Philip Sklarz were licensed under the act.

7. On or about June 7, 1946, in the course of interstate commerce, complainant's agent, Dale Buller, sold to respondent, Philip Sklarz, approximately 16 acres of onions then planted on complainant's farm near Shafter, California, estimated as comprising seven or eight carloads. The onions were sold at an agreed price of \$2 per sack, f. o. b. California shipping point. Complainant's agent warranted the onions to be 85 percent or better U. S. No. 1 grade.

8. On June 9 and 11, 1946, respectively, complainant shipped to respondent, Philip Sklarz, at Philadelphia, cars SFRD 21345 and SFRD 4663, each of which contained 600 50-pound sacks of onions.

These two carloads of onions were accepted and paid for by Albert Sklarz as agent for respondent, Philip Sklarz.

9. On June 13, 1946, complainant shipped to respondent, Philip Sklarz, at Philadelphia, cars MDT 20511 and MDT 17298 containing a total of 1,200 50-pound sacks of onions meeting contract requirements. Upon arrival of these two shipments at Philadelphia, they were rejected to complainant's broker, Mrs. E. Lindsay, by respondent, Philip Sklarz. Thereafter, the two carloads were abandoned to the railroad carrier.

10. Following rejection of cars MDT 20511 and MDT 17298 by respondent, Philip Sklarz, complainant resold elsewhere the onions contained in the three remaining cars SFRD 25523, ART 15472, and GARX 67346.

11. Informal complaint was made on June 25, 1946, and within 9 months after the cause of action accrued. The counter-complaint by respondent Mrs. E. Lindsay was filed on June 13, 1947, which was not within 9 months after the alleged cause of action accrued.

#### CONCLUSIONS

It is the contention of respondent, Philip Sklarz, that no contract was ever entered into with complainant for the purchase of the seven carloads of onions involved in this transaction. Philip Sklarz testified that although he was in California in June 1946, and visited approximately 10 farms in search of onions, he never met complainant A. E. Buller or Dale Buller, nor did he visit complainant's farm. He also testified that his dealings were with respondent, Mrs. E. Lindsay, from whom he ordered 10 carloads of medium size, U. S. No. 1 onions; and that in addition to shipping seven cars not involved in this proceeding, Mrs. Lindsay also shipped cars SFRD 21345 and SFRD 4663, for which she received payment of \$2,400 from Albert Sklarz, who was subsequently reimbursed in this amount by Philip Sklarz, and cars MDT 20511 and MDT 17298, which were rejected at destination for failure to meet the warranty of U. S. No. 1 medium size onions.

Deposition witness, Albert Sklarz, testified to participating in the transaction only to the extent of paying Mrs. E. Lindsay approximately \$2,500 for onions purchased by his brother, Philip Sklarz.

Complainant's son, Dale Buller, a deposition witness, testified that the onions in controversy were sold by him to Philip Sklarz and Albert Sklarz, with the parties agreeing the onions were to grade 85 percent U. S. No. 1 or better, and with acceptance thereof to be final at the time the onions were loaded aboard cars at shipping point.

Respondent, Mrs. E. Lindsay, testified in her deposition that she introduced Philip and Albert Sklarz to the Bullers; that she was present at the time the purchase and sale of complainant's field of onions was negotiated by the parties; that she acted as complainant's broker in finding a buyer; and that the onions were sold on an acceptance final basis. However, in a letter addressed to the Department under date of December 30, 1946, Mrs. Lindsay stated that she did not participate in the transaction between the Sklarz brothers and Dale Buller and did not hear the conversations between them in which the contract was made, but that the matter was discussed in her presence after the three had made all arrangements. She did not say that "acceptance final" was mentioned.

In determining the rights and responsibilities of the parties the foregoing testimony presents for consideration two disputed questions: (1) whether a valid legal contract was negotiated between A. E. Buller and Philip Sklarz; and (2) if so, was it upon an "acceptance final" basis and did its terms include the warranty of "85 percent U. S. No. 1 grade or better" or onions of "U. S. No. 1 medium size?"

We have no hesitancy in concluding, from the evidence of record, that Philip and Albert Sklarz, in company with Mrs. E. Lindsay, visited complainant's farm on June 7, 1946, and that Philip Sklarz then and there contracted to purchase from complainant all of the onions to be harvested from certain fields. The quantity turned out to consist of seven carloads. Philip Sklarz admits he was accompanied by Mrs. Lindsay in visiting approximately 10 farms. He could not recall the names of any of the people he met, with one exception, and denied having met the Bullers or that he made any contract with them for onions. Dale Buller, A. E. Buller, and Mrs. Lindsay all testified that the Sklarz brothers visited the Buller farm and that a contract was made for the purchase and sale of the onions in question. The detailed accounts of these individuals as to what took place is entitled to greater weight than the flat denials of Philip Sklarz.

As to the terms of the contract, complainant falls far short of sustaining the burden of proving its allegation that the onions were sold on an f. o. b. acceptance final basis. To establish an acceptance final contract the evidence must be clear and convincing. In this case the evidence that "acceptance final" was a term of the contract is neither clear nor convincing. However, the evidence does establish that the contract was for 85 percent U. S. No. 1 or better onions. It is concluded, therefore, that the contract was for 85 percent U. S. No. 1 or better onions, on an f. o. b. shipping point basis.

The record shows that the onions in controversy were loaded into seven cars at shipping point by complainant. The onions in two of

these cars, SFRD 21345 and SFRD 4663, were accepted and paid for by respondent, Philip Sklarz. Two others, MDT 20511 and MDT 17298, were rejected at destination by Philip Sklarz and thereafter abandoned to the carrier by respondent, Mrs. E. Lindsay. The remaining three carloads, SFRD 25523, ART 15472, and GARX 67346, according to complainant (answers to direct interrogatories Nos. 32 and 33), were consigned to Burns & Bay of Nampa, Idaho, by complainant who realized proceeds of approximately \$963 upon resale.

Shipping point inspection certificates covering cars MDT 20511 and MDT 17298, of which we take official notice, show that the onions in the former car graded 88 percent U. S. No. 1 quality, and those in the latter car graded 89 percent U. S. No. 1 quality, both on June 13, 1946, the date of shipment. Since there is no evidence to the contrary, we conclude that these two carloads met contract requirements when shipped. There is no evidence of the condition of these shipments on arrival at Philadelphia. Respondent Philip Sklarz rejected the two shipments but in our opinion, was not justified in such rejections. We conclude that the rejections were without reasonable cause and in violation of section 2 of the act. We then have the question of complainant's damages on these two shipments. The onions in cars MDT 20511 and MDT 17298 were abandoned to the carrier by complainant's broker, Mrs. E. Lindsay. Following respondent's rejection, it was complainant's duty to take reasonable steps to mitigate damages. Complainant offered no evidence to show that the action of his broker in abandoning these two shipments to the carrier was reasonable in the circumstances. Accordingly, it is concluded that there is no basis for an award of reparation in connection with these two carloads of onions.

As to the resale of the onions contained in cars SFRD 25523, ART 15472, and GARX 67346, complainant seeks to establish his loss by reference to copies of accountings attached to the complaint in exhibit form (Ex. 7, 8 and 9). The only other evidence of loss is contained in complainant's deposition where, in answer to questions asked regarding resale of these cars and the amounts of proceeds received, complainant testified, "They were consigned to Burns & Bay;" and "approximately \$963.00." Exhibits attached to the complaint properly form a part of the pleadings, but this does not make them competent or admissible as proof. In a recent case, *Anonymous*, 8 A. D. 810, decided March 25, 1949, it was held that affidavits attached to the complaint as exhibits and referred to in the complaint are not a part of the evidence in a hearing case unless formally offered and received in evidence at the hearing. In that case, as here, the affidavits were never offered in evidence. We stated there that the examiner's

report and the final order must be prepared "upon the basis of the evidence received at the hearing" (7 CFR, 1945 Supp. 47.19 (2) (d)). Complainant's loss on these three carloads was susceptible of definite computation and he was afforded ample opportunity to present adequate proof of damages. In cross-interrogatory No. 8, counsel for Philip Sklarz requested complainant to:

"Give the car numbers, dates, and times of shipment of any cars not shipped to Philip or Albert Sklarz and if the same were sold to any one else give the name and address of the person to whom sold, the basis of sale, and attach to the cross-interrogatory all papers in connection with this transaction, specifically any accounting therefor."

Complainant replied to this interrogatory as follows: The answer to this question may be obtained from my attorney."

In the absence of acceptable proof of loss, complainant is not entitled to an award of reparation on these three shipments.

The counterclaim of respondent Mrs. E. Lindsay, in which she seeks to recover from complainant for brokerage fees on cars which she shipped and billed out, must be dismissed for lack of jurisdiction. The counterclaim was not filed until June 13, 1947, more than 9 months after the alleged cause of action accrued. Moreover, complainant is not licensed or subject to license under the act, so we would have had no jurisdiction to award reparation against complainant even if the counterclaim had been properly filed.

As to the defense of the statute of frauds, pleaded by counsel for respondent Philip Sklarz at the opening of the hearing, the statute was probably satisfied by the payment made for the first two carloads shipped. In view of what has been said concerning other points, however, no ruling on this defense need be made.

The complaint, as filed, does not set forth a cause of action against respondent Mrs. E. Lindsay, and the record contains no evidence whatever that this respondent violated the act. It is concluded that the complaint as to the respondent, Mrs. E. Lindsay, should be dismissed.

The complaint should be dismissed as to the respondents William Zwilling and Albert Sklarz. There is no evidence of record that respondent William Zwilling in any way violated the act, or that respondent Albert Sklarz was licensed or subject to license under the act at the time of the alleged violation.

In summary, it is concluded that respondent Philip Sklarz's actual rejection of cars MDT 20511 and MDT 17298, and constructive rejection of cars SFRD 25523, ART 15472, and GARX 67346 was without reasonable cause and in violation of the act; that complainant has failed to prove the amount of damages, if any, suffered as a result of such rejections, and because of this failure the complaint as to

Philip Sklarz should be dismissed; that the complaint as to respondents Mrs. E. Lindsay, doing business as the Sun-Glo Fruit and Produce Company, and William Zwilling should be dismissed for failure to state a cause of action against these respondents; that the complaint as to Albert Sklarz should be dismissed for lack of jurisdiction, this respondent not being licensed or subject to license under the act; and that the counter-complaint of respondent, Mrs. E. Lindsay, against complainant, A. E. Buller, should also be dismissed for lack of jurisdiction. The facts should be published.

### ORDER

The complaint as to all respondents herein named is dismissed. The counter-complaint of respondent Mrs. E. Lindsay is dismissed. The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2388)

D. J. FLETCHER v. OZARK PACKING COMPANY. PACA Doc. No. 5034.  
Decided March 6, 1950.

### Failure To Pay Purchase Price

Where the evidence shows that complainant sold and shipped to respondent three carloads of spinach in accordance with the contract requirements and shipped the spinach in accordance with respondent's instructions, and respondent accepted the spinach, and alleged but failed to prove a breach of contract, necessity for dumping the spinach and resulting damages, it is held, that respondent is entitled to an award of reparation.

### Contract of Purchase and Sale—Unloading of Shipment—Failure To Give Notice of Defects

Where a purchaser accepted and unloaded three shipments of spinach prior to giving notice to the shipper of alleged defects, held, such action constitutes acceptance and the purchaser is liable for the entire purchase price in the absence of proof of damages resulting from a breach of warranty by the shipper.

### Damages—Notice of Defect

A necessary prerequisite to a claim for damages is notice given within a reasonable time of the defect complained of.

### Issuance of Inspection Certificates To Show Necessity for Dumping

When perishable commodities are dumped it is customary to obtain a certificate issued by the Health Department of the city or other authority showing the necessity for dumping.

### Proof of Damages by Inspection Certificates

Where proof of damages rests upon showing the necessity for dumping, lack of such proof precludes recovery.

*Mr. Jay Dickey*, of Pine Bluff, Arkansas, for complainant. *Mr. H. P. Daily* of Daily & Woods, of Fort Smith, Arkansas, and *Mr. Jeta Taylor*, of Ozark, Arkansas, for respondent. *Mr. Raymond O. Denham*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C., 1946 ed., 499a *et seq.*). Complainant seeks an award of reparation in the amount of \$2,894.40 which, it is alleged, represents the unpaid purchase price of three carloads of spinach shipped by complainant from La Pryor, Texas, to respondent at Ozark, Arkansas, during the month of January 1948. An oral complaint was made by complainant on February 24, 1948, and a formal complaint filed April 12, 1948.

On October 5, 1948, respondent filed an answer admitting the contract for the purchase of the spinach, but denying liability for the purchase price thereof on the ground that the spinach was rotten on arrival at Ozark, Arkansas, as a result of complainant's failure to ice in accordance with respondent's instructions. Respondent in its answer requested an oral hearing.

A formal hearing was held at Ozark, Arkansas, on June 10, 1949, at which both complainant and respondent were represented by counsel. On behalf of complainant there was introduced in evidence the oral testimony of D. J. Fletcher, complainant herein, and four additional witnesses. On behalf of respondent there was introduced in evidence the testimony of W. Bradley Kinbrough, president and manager of respondent corporation, and the testimony of two additional witnesses.

### FINDINGS OF FACT

1. Complainant is an individual, D. J. Fletcher, whose address is P. O. Box 302, La Pryor, Texas.

2. Respondent, Ozark Packing Company, is a corporation, whose address is Box 147, Ozark, Arkansas. At the time of the transaction involved herein respondent was not licensed under the act, but was subject to license. Respondent subsequently made application for and was issued a license.

3. On or about January 20, 1948, in the course of interstate commerce, the parties entered into an oral agreement for the sale by complainant to respondent of certain designated spinach, then growing (estimated as 6 to 10 carloads), at a price to be agreed upon by the parties before shipment of each carload or truckload of spinach.

4. Respondent specified the type of icing to be used in connection with all shipments of spinach. Such instructions were contained in a telegram dated January 20, 1948, and were as follows: "Do not put ice in baskets in loading spinach. Use only blown ice."

5. Pursuant to the terms of the contract, complainant shipped from La Pryor, Texas, to respondent at Ozark, Arkansas, on January 21, 1948, two carloads of spinach (SFRD 8573 and FGEX 52149), each containing 864 bushels, for an agreed price of \$1.20 per bushel, f. o. b. loading point in Texas and on January 22, one carload of spinach (ART 18603) containing 864 bushels, at an agreed price of \$0.95 per bushel, f. o. b. loading point in Texas. The spinach contained in car SFRD 8573 arrived at destination at 5 p. m., January 24, and respondent was notified of arrival the same day. Unloading of this car was completed at 4 p. m., January 27. The shipment contained in car FGEX 52149 arrived at destination at 6 a. m., January 25, and respondent was notified of arrival at 8 a. m. the same day. Unloading of this car was completed at 4 p. m. on January 27. Car ART 18603 arrived at destination at 4 p. m. on January 25 and respondent was notified of arrival at that time. Unloading of this shipment was completed at 5 p. m. on January 28.

6. The three carloads of spinach in question were inspected at the time of loading by a Federal-State of Texas inspector and certified as grade U. S. No. 1. All shipments were iced by complainant by blowing snow ice over the top of each load. All shipments arrived at destination within normal transportation time. There was no abnormal change in the weather at shipping point during the loading of the shipments.

7. Respondent took no action within 24 hours after arrival of the shipments, or at any other time, to notify complainant that respondent was rejecting the spinach. Respondent first notified complainant on February 3, 1948, that the condition of the spinach was unsatisfactory, which was approximately 10 days after its arrival, and approximately 7 days after the spinach was unloaded and allegedly dumped. There was no Federal, State, or other acceptable inspection of the spinach after arrival, only the inspection made by employes of the respondent and the carrier's relief agent, L. E. Powell.

8. The three carloads of spinach in controversy were shipped "freight collect." The freight bill for each car is dated January 26, 1948. Respondent paid the freight on these cars on January 31, 1948. All of the bills bear a penciled notation "Cks all Spinach Rotten. W/R Ozark. L. E. Powell. WEB." Two of the notations are marked "1/26/48". The date February 26, 1948, on the third bill appears to be a clerical error and probably should be January 26, 1948. These



notations were placed on the bills by W. E. Butler, the carrier's regular agent. The spinach in the cars in controversy was not inspected by Mr. Butler. No written or formal report of inspection was made by Mr. Powell, the carrier's relief agent. Mr. Butler stated with reference to cars ART 18603 and SFRD 8573: "No copy of inspection report on file this office. Relief agent working at that time," and with reference to car FGEX 52149: "Inspection made but no record on file. Relief agent working at that time."

9. The contract price of the three shipments was \$2,894.40. No part of this amount has been paid by respondent to complainant.

10. Formal complaint was filed by complainant on April 12, 1948, which was within 9 months after the cause of action accrued.

### CONCLUSIONS

Complainant's evidence shows, and it is undisputed that, insofar as this proceeding is concerned, complainant's obligation pursuant to the contract of the parties was to deliver to respondent three carloads of spinach f. o. b. shipping point. It is also clear that respondent specifically instructed complainant not to use ice in the baskets in loading the spinach, but to use only blown or snow ice. It is also undisputed that the three carloads of spinach in question graded U. S. No. 1 at the time of loading.

Additional facts of record disclose that all three cars in controversy were received by respondent no later than 4 p. m., January 25, and that unloading of two of the cars was completed at 4 p. m., January 27, and of the third car at 5 p. m., January 28. The spinach was allegedly dumped by respondent as it was unloaded from the cars. Respondent waited until February 3 to notify complainant of the alleged unsatisfactory condition of the spinach and notice, at that time, was by letter. Respondent's action in unloading the spinach prior to giving notice to complainant constituted an affirmative act of acceptance. *A. Bertola & Sons v. Jack Kerzner*, 8 A. D. 754. Having accepted the spinach, respondent became liable for the entire purchase price thereof, subject to his right to reduce such liability by proving damages resulting from a breach of warranty on the part of complainant. *Sea Island Vegetables, Inc. v. Chabot Bros., Inc.*, 8 A. D. 323.

A necessary prerequisite to a claim for damages is notice given within a reasonable time of the defect complained of. *Ayres Brokerage Company v. Elba Produce Company*, 3 A. D. 422. In this case, as shown above, respondent having knowledge of the condition complained of, waited some 9 or 10 days to give notice to complainant. Even then the "notice" was in the form of a letter and, while stating

that the spinach was rotten, informed complainant a claim was being filed by respondent against the railroad and no reference was made to any claim against complainant. In our view, the requisite notice was not given complainant herein within a reasonable time.

Although the proceeding might be decided at this point, there are other significant facts in the case which we believe merit discussion. Respondent does not contend that the spinach was of poor quality, or that it contained any inherent weakness at the time of shipment. Respondent's only defense is that the express requirements of the contract as to packing the shipment with blown ice were not properly carried out by complainant and that, as a consequence, the three shipments were a complete loss. With respect to the allegation of breach of contract, the facts show that the spinach was packed in bushel baskets and after loading it into the cars complainant iced the shipments by blowing snow ice over the top of the baskets. Respondent contends that the ice should have been blown in the spaces around each basket of spinach and on top of the load. It is apparent there is a wide variance between the understanding of the parties as to the proper and customary method of icing when the use of blown ice is prescribed. A Department of Agriculture inspector, who is supervisor of inspectors and collaborator for the United States and Texas Departments of Agriculture, with some 20 years' experience as an inspector, testified that in his opinion the blowing of snow ice over the top of the load would constitute proper icing where use of blown ice was specified. Such opinion lends weight to complainant's contention. We conclude, upon the evidence presented, that the shipments were iced by complainant in accordance with contract requirements.

Other significant facts of record show that, pursuant to the contract under discussion, but not involved in this proceeding, there were three carloads and two truckloads of spinach sold and delivered by complainant to respondent in addition to the three carloads in question. It should be noted that the eight shipments under the contract were iced in the same manner, all graded U. S. No. 1 at the time of loading, and all arrived at destination within a 3-day period of time, without abnormal change in weather during such period, and within normal transportation time. The three carloads and two truckloads of spinach not in controversy were found to be in perfect condition on arrival and were paid for by respondent, whereas the three carloads involved in this proceeding were alleged to be in such deteriorated condition upon arrival that they could not be unloaded until they had been opened and aired out for more than 24 hours. Respondent offered no explanation of this fact other than its testimony that the spinach in the cars in controversy was rotten upon arrival.

Significantly, evidence of record shows that respondent did not obtain an official or acceptable inspection of the spinach in question at destination; and respondent, according to its own testimony, proceeded to dump the spinach without giving notice to complainant of the condition complained of. Respondent's witnesses did testify that upon arrival of the spinach an inspection was made by employees of respondent and by the carrier's relief agent, and that all the spinach was dumped. Also, over objection, respondent introduced in evidence copies of paid freight bills bearing notations to the effect the spinach was rotten. The notations appear to have been made on the freight bills by the freight agent from notations purportedly made of inspections, which inspections were alleged to have been made of the shipments by a relief agent of the railroad no longer in the locality. Complainant has shown the spinach graded U. S. No. 1 at shipping point, and in addition presented rebuttal testimony to the effect that respondent accepted and canned some of the spinach shipped from La Pryor, Texas, on January 21. There was no Federal inspection, or inspection by an independent inspection agency, or by the local health officer. There was no evidence that respondent requested or sought to obtain an inspection by an independent or disinterested agency or person, although when perishable commodities are dumped it is usual to obtain a certificate issued by the health department of the city, or other authority, showing the necessity for dumping. Where proof of damages rests on such necessity, lack of proof of the necessity for dumping precludes recovery. *Anonymous*, 5 A. D. 25.

In conclusion, complainant shipped three carloads of spinach to respondent, which met contract requirements and which were accepted by respondent. Respondent failed to notify complainant within a reasonable time of the alleged unsatisfactory condition of the spinach on arrival. In addition, respondent has failed to show that complainant breached the contract in any respect; or even that the spinach arrived in an unsatisfactory condition. Accordingly, respondent is liable for the full purchase price of the three shipments. Reparation in the amount of \$2,894.40, plus interest, should be awarded complainant, and the facts should be published.

#### ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$2,894.40, with interest thereon at the rate of 5 percent per annum from February 1, 1948, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2389)

**HOFFMAN BANANA COMPANY v. HALL & COMPANY. PACA Doc. No. 5091. Decided March 6, 1950.**

**U. S. Standards Considered in Determining Allowable Tolerance—  
Undersize Watermelons**

Where the contract for the sale of a carload of watermelons specified that the average weight of the melons was 29 pounds, even though the contract made no reference to the U. S. Standards for watermelons, the tolerance provisions of the U. S. Standards must be considered in determining what deviation from 29 pounds was to be allowed.

**Dismissal—Breach of Contract—Failure To Comply With Terms of Contract**

Since the U. S. Standards for watermelons provide that melons in any lot averaging less than 30 pounds shall not vary more than 4 pounds below the stated average, and not more than 5% of the melons in any lot may be below the minimum size requirements, it is held, that contract for sale of a carload of watermelons averaging 29 pounds was breached by a tender of a carload of watermelons of which 15% were under 23 pounds.

*Messrs. Naman, Howell & Boswell, of Waco, Texas, for complainant. Mr. A. N. Brockway, of Pittsburgh, Pennsylvania, for respondent. Mr. John F. McCarty, Presiding Officer.*

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*), involving the sale by complainant to respondent of a carload of watermelons on July 9, 1948, and a second carload on July 13, 1948. Complainant seeks to recover the amount of \$287.17, the loss allegedly sustained as a result of respondent's rejection of the second carload without reasonable cause. Respondent denies liability and asserts a claim for \$50 in connection with the contract of July 9, 1948. Informal complaint was received from complainant by the Regulatory Division, Fruit & Vegetable Branch, on July 22, 1948, and formal complaint was filed December 2, 1948. Respondent, Hall & Company, filed an informal complaint relative to the July 9 transaction on September 13, 1948. A copy of the formal complaint together with a copy of the report of investigation, prepared by the Regulatory Division, was served by registered mail upon respondent on February 4, 1949.

A copy of the report of investigation was served upon complainant on February 7, 1949. Respondent's answer and countercomplaint was filed on February 15, 1949. Complainant was served with a copy of the answer and countercomplaint on February 21, 1949, with notice that he had 10 days within which to file a reply under the applicable rules of practice. No reply was filed.

Since the amounts claimed do not exceed \$500, the issues were submitted under the shortened procedure in accordance with section 47.20 of the rules of practice. Although complainant was notified by registered mail on April 11, 1949, that it would have 20 days within which to file an opening statement, no such statement has been filed. Respondent filed an affidavit in support of its answer and counterclaim.

### FINDINGS OF FACT

1. Complainant is an individual, H. Hoffman, doing business as Hoffman Banana Company, whose address is Waco, Texas.

2. Respondent is an individual, Ernest A. Hall, doing business as Hall & Company, whose address is 319 Catanzaro Building, Pittsburgh, Pennsylvania. At the time of the transactions involved in this proceeding complainant and respondent were licensed under the act.

3. On July 13, 1948, the parties entered into a contract for the sale by complainant to respondent of a carload of Black Diamond watermelons in car PFE 62436. Complainant represented that the car contained approximately 976 melons, averaging 29 pounds each, and that the melons were of good quality and in good condition. The agreed price was \$1.55 per hundredweight, or \$438.73 total, f. o. b. shipping point.

4. Car PFE 62436 was shipped from Stockdale, Texas, at 10 a. m., July 13, 1948. The melons were weighed prior to shipment and the total weight was certified to be 28,405 pounds.

5. The shipment arrived at Pittsburgh, Pennsylvania, at 1:05 a. m., July 21, 1948. Respondent was notified of the arrival at 5:40 a. m. that day. Respondent inspected and rejected the car at 12:15 p. m. the same day. Thereupon, complainant resold the carload to another dealer for a net of \$73.73.

6. The watermelons were not inspected at shipping point. At destination they were inspected by the Railroad Perishable Inspection Agency at 11:05 a. m., July 21, 1948. The report stated the condition of the melons to be as follows:

"Melons fairly firm to firm, stems untreated  $\frac{1}{2}$  to 2 inches, all brown. 4% decay, Soft Rot on sides of melons. 6% decay starting at blossom end."

Also, they were officially inspected at Pittsburgh, Pennsylvania, on July 22, 1948, at 12:20. At applicant's request, the inspection certifi-

cate was restricted to condition and size only. The certificate certified that sizes ranged from 17 to 38 pounds each, the average was 27 pounds, and 15 percent of the melons were under 23 pounds. The condition of the melons was as follows:

"Melons generally firm 12% stem end rot early to advanced stages and Soft Rot occurring as spots on side of melons."

At least 15 percent of the melons weighed more than four pounds less than the average weight specified in the contract, which was 10 percent in excess of reasonable tolerance for underweight melons.

7. In performance of a contract of sale entered into by the same parties on July 9, 1948, complainant shipped to respondent at Pittsburgh a carload of watermelons in car PFE 41681. Because the melons in that shipment were undersized and showed considerable decay, complainant agreed to make respondent an allowance of \$50 in connection therewith. Respondent paid complainant the full contract purchase price for this shipment but has not received the \$50 allowance agreed upon. This amount is now the subject of the countercomplaint.

8. Formal complaint was filed on December 2, 1948, and the countercomplaint was received on February 15, 1949. Each was filed within nine months after the cause of action accrued.

### CONCLUSIONS

The contract of July 13, 1948, was negotiated between complainant and respondent by an independent broker and salesman, Tri-State Sales Agency of Pittsburgh, Pennsylvania. Complainant submitted with the formal complaint a copy of the standard confirmation of sale issued by that Agency relative to the contract. The confirmation is signed by E. A. Hall for Hall & Company as buyer, and by the Agency as authorized broker or salesman for Hoffman Banana Company, the seller. The confirmation states that car PFE 62436 was sold to Hall & Company for the account of Hoffman Banana Company; that the order was received and confirmed on July 13, 1948; that the car was shipped from Stockdale, Texas, on July 12, 1948; and that the sale was f. o. b. shipping point, usual terms. As to the balance of the terms, the confirmation reads "One (1) Car good quality, good condition, Black Diamond Watermelons Containing approximately as follows: 976 melons—average weight 29#—28305# net weight \$1.55 per cwt. f. o. b." It is considered that the confirmation sets forth the full and correct terms to which the parties agreed because they do not contend otherwise.

Complainant alleges that the melons in car PFE 62436 fully complied with the contract specifications. Respondent alleges that it was justified in rejecting the melons on three grounds: (1) the size of the

melons tendered did not comply with contract specifications; (2) the melons were not in suitable shipping condition when shipped; (3) the carload was not shipped on the date specified in the contract.

Respondent contends that the weight of the melons in the carload averaged less than 29 pounds each and that the size of the melons was irregular. Where a contract for the sale of watermelons specifies the average weight only, there may be a breach as to size in at least two ways. If the actual average weight does not approximate that required by the agreement, the shipment is not responsive to the contract. Even though the average weight requirement is met, the contract may be breached by the tender of a carload which contains a substantial quantity of "offsize" melons. It is necessarily implied that there shall be some approximation of uniformity. Otherwise, specifying an average weight serves no purpose. When a party contracts to buy a shipment of melons averaging 29 pounds, he has a right to expect most of the load to weigh about 29 pounds. In short, in the absence of specification as to a maximum or minimum weight, it is assumed the parties contemplated the application of reasonable tolerances.

Respondent was not justified in rejecting the carload on the ground that the average weight of the melons was below contract specification. Complainant submitted weight certificates issued at shipping point showing that 967 melons weighed a total of 28,405 pounds. The railroad bill of lading states that the melons weighed 27,060 pounds. Of the two weights, we think that shown by the weight certificates issued at shipping point is more probably correct. On the basis of these certificates, the melons averaged 29.37 pounds.

With respect to the variation in size of the melons tendered, respondent contends that the carload of melons did not comply with the size tolerance provided in the U. S. Standards for Watermelons. Although the melons were not sold on the basis of the U. S. Standards for Watermelons, it is our opinion that the tolerance provision was within the contemplation of the parties and must be taken into consideration in this controversy. The U. S. Standards, effective February 12, 1945, reads in part as follows:

#### "Size

"Where the size of watermelons is stated in terms of average weight, *unless otherwise specified*, the melons in any lot averaging less than 30 pounds shall not vary more than 4 pounds below the stated average, and the melons in any lot averaging 30 pounds or more shall not vary more than 6 pounds below the stated average.

"Size may also be stated in terms of minimum weight.

"In order to allow for variations, incident to proper sizing, not more than 5 percent, by count, of the watermelons in any lot may be below the minimum size requirements."

In this case, the official inspection certificate issued at Pittsburgh certified that the sizes ranged from 17 to 38 pounds, averaging 27 pounds, and 15 percent were under 23 pounds, which is considerably below the tolerance allowed by the U. S. Standards. It is concluded that reasonable tolerances as to size were exceeded and the shipment did not meet contract specifications. This constitutes such a material breach as justifies respondent's rejection of the car. Having found that respondent had reasonable cause for rejection of the car, it is unnecessary to consider the other breaches alleged by respondent.

The failure of respondent to accept and to pay for the carload of watermelons was not a violation of section 2 of the act. The failure of complainant to pay the \$50 allowance which is admittedly due and owing to respondent in connection with car PFE 41681 is a violation of section 2 of the act and respondent is entitled to reparation in that amount. Respondent should be awarded reparation in the amount of \$50, with interest, and the facts should be published. The complaint should be dismissed.

#### **ORDER**

Within thirty days from the date of this decision, complainant shall pay to respondent, as reparation, \$50, with interest thereon at the rate of 5 percent per annum from August 1, 1948, until paid.

The complaint filed herein is dismissed.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2390)

**McCLINTICK & COMPANY v. MILLER BROKERAGE COMPANY. PACA**  
Doc. No. 5279. Decided March 6, 1950.

#### **Failure To Pay Purchase Price—Default**

Where complainant alleged that he sold a carload of potatoes to respondent, but respondent failed to pay the purchase price, and where respondent failed to answer the complaint, held, failure to answer the complaint constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, and complainant should be awarded reparation in the amount of the purchase price.\*

*McClintick & Company*, of Tustin, Michigan, complainant *pro se*. *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

#### **PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*).

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.



Informal complaint was received by the Regulatory Division April 18, 1949. Formal reparation complaint was filed September 20, 1949, alleging failure on the part of respondent to pay the agreed purchase price for a carload of potatoes sold to respondent on or about December 22, 1948. A copy of the report of investigation made by the Fruit and Vegetable Branch was served on complainant October 20, 1949. On October 19, 1949, copies of the report of investigation and the formal complaint were served on respondent.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint and a waiver of oral hearing. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

#### FINDINGS OF FACT

1. Complainant is an individual, Charles McClintick, trading as McClintick & Company, whose post office address is Tustin, Michigan.

2. Respondent is an individual, W. L. Miller, trading as Miller Brokerage Company, whose post office address is 323-329 North Lee Street, Salisbury, North Carolina. At the time of the transaction complained of herein, respondent was licensed under the act.

3. On or about December 22, 1948, complainant sold to respondent a carload of 450 bags of Michigan No. 1 potatoes at \$3.33 per bag delivered Salisbury, North Carolina, or a total sales price of \$1,090.62 after deduction of freight charges and tax.

4. On or about December 22, 1948, complainant shipped 450 bags of potatoes which conformed with the contract as to kind, quality, grade and size, in car PFE 96518, in interstate commerce, from Tustin, Michigan, to respondent in Salisbury, North Carolina.

5. Respondent accepted the potatoes but has not paid the agreed purchase price of \$1,090.62, or any part thereof.

6. Informal complaint was filed April 18, 1949, which was within nine months after the cause of action accrued.

#### CONCLUSIONS

Failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, as provided in the rules of practice (7 CFR 47.8 (c)).

The facts alleged and thus admitted are that complainant sold to respondent 450 bags of Michigan No. 1 potatoes at the agreed price of \$3.33 per bag delivered, or a total sales price after deduction of

freight charges and tax of \$1,090.62; that complainant shipped potatoes in interstate commerce which were accepted by the respondent as conforming with the terms of the contract; and that respondent has not paid the agreed purchase price of \$1,090.62, or any part thereof. Respondent's failure to pay the agreed purchase price is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$1,090.62, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$1,090.62, with interest thereon at the rate of 5 percent per annum from January 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2391)

GOLDSBY-EVANS PRODUCE COMPANY v. ERNEST E. FADLER COMPANY.  
PACA Doc. No. 4674. Decided March 14, 1950.

### Petition for Rehearing and Reconsideration

Petition dismissed where statute of frauds is inapplicable, there is no showing complainant is not proper person to maintain action, facts do not show an accord and satisfaction, and prior order is supported by the credible evidence of record and by applicable law.\*

### Inapplicability of Statute of Frauds

Statute of frauds is inapplicable where shipments were made after inspection and acceptance by buyer's agent and after resales by buyer.\*

### Accord and Satisfaction—Check Not Accepted as Payment in Full

No accord and satisfaction exists where check was not tendered by buyer nor accepted by seller as payment in full.\*

*Mr. Warren S. Earhart*, of Kansas City, Missouri, for respondent.

*Decision by Thomas J. Flavin, Judicial Officer*

### ORDER DISMISSING RESPONDENT'S PETITION FOR REHEARING AND RECONSIDERATION

This is a proceeding under the Perishable Agricultural Commodities Act, 1930, as amended. On February 14, 1950, an order was issued

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

granting complainant's petition for reconsideration, and vacating the order of January 4, 1949. The order of February 14, 1950, requires respondent to pay to complainant as reparation \$3,994.87, plus interest, and dismisses respondent's counterclaim. Such order was served by registered mail upon respondent on February 16, 1950. On February 23, 1950, and within the time prescribed by the rules of practice, respondent filed a petition for rehearing and reconsideration of the order.

We think little need be added to our order of February 14, 1950. With respect to respondent's contention that the Statute of Frauds is applicable, the sales herein were of specific goods; that is, shipments were made after inspection and acceptance by respondent's agent, Sullivan. This alone is enough to satisfy the Statute. However, if further evidence were needed to show that respondent received and accepted the goods, it could be found in respondent's resales of the shipments. Respondent's statements, made to its agent, to the effect that disposal of the carrots was being made for the account of complainant, where complainant did not have notice of such action and did not agree to such disposal, cannot have the effect of negating respondent's acceptance under the original contract.

With respect to respondent's allegation that complainant is not the proper person to maintain this proceeding; the facts show that complainant is a party to the sales agreements in question, and that complainant made the shipments in question to respondent. The complaint shows that the amount claimed "is now due and owing complainant from respondent." Also, respondent dealt throughout the transactions with complainant as the real party with interest, and filed a counterclaim against complainant. Respondent has submitted no evidence to show complainant is not the real party in interest. It appears the only basis for respondent's allegation is that in complainant's Petition for Reconsideration complainant's representative stated that "Complainant on behalf of their grower employed the writer, a non-attorney at bar, as their representative in this case relying on the fact that Administrative hearings are not governed by the strict rules of evidence of courts of law." Even if further investigation should disclose that these proceedings were being maintained by complainant on behalf of one of its growers, still this would not bar recovery of reparation by complainant. Many times we have awarded reparation to an agent where it is shown that such agent had authority to make collection. There is no real showing here that complainant is acting as agent.

Respondent also contends that complainant accepted respondent's check, dated July 9, 1946, in the amount of \$184.13, in connection with

the carrots shipped in car SFRD 38882, as full settlement after a dispute had arisen in connection with the shipment. The facts show respondent's check was tendered to complainant as part of an "accounting" in connection with respondent's resale of this shipment to the S. D. Monasch Produce Company of Cleveland, Ohio. The check was not marked "payment in full" or the equivalent of that term. On July 13, 1946, complainant wrote to respondent acknowledging receipt of the check, and stating that complainant was accepting the money as part payment only on the shipment. The check, not having been tendered by respondent as payment in full of a disputed amount and not having been accepted by complainant as payment in full, no basis is established for finding an accord and satisfaction, even as to the one carload.

We do not agree with respondent's general allegations to the effect that the order of February 14, 1950, is unsupported by the evidence of record. In our opinion the order is supported by credible evidence of record and by applicable law.

For the reasons stated, respondent's petition for rehearing and reconsideration is dismissed without service on complainant.

The reparation awarded in the order of February 14, 1950, shall be paid within 30 days from the date of this order.

Copies hereof shall be served upon the parties.

The facts and circumstances set forth herein shall be published.

(No. 2392)

HAMILTON BROTHERS, INC. v. BURKETT FRUIT COMPANY. PACA Doc. No. 4980. Decided March 14, 1950.

#### **Failure To Pay Purchase Price—Acceptance**

Where complainant sold and delivered two truckloads of bananas to respondent f. o. b. Tampa, Florida, and the bananas were received, unloaded, and distributed by respondent at destination, and respondent failed to prove the bananas did not meet contract requirements, held, respondent's action constitutes acceptance of the bananas and complainant should be awarded reparation in the amount of the entire purchase price.\*

#### **Evidence—Failure To Show Breach of Contract Requirements**

Where buyer alleged that two carloads of bananas failed to ripen properly, which statements were not supported by documentary or other evidence as to the nature or extent of the alleged unsatisfactory condition, held, that the buyer failed to show by a preponderance of the evidence that the bananas did not meet contract requirements\*

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

### Acts Showing Acceptance

Where a buyer unloaded two truckloads of bananas delivered to him by the seller, and distributed the bananas to dealers, such action constitutes acceptance under the contract.\*

*Mr. John W. McWhirter*, of Tampa, Florida, for complainant. *Burkett Fruit Company* of Pine Bluff, Arkansas, respondent *pro se*. *Mr. Sidney D. Williams*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). An informal complaint was filed on August 29, 1947, and a formal complaint was filed on February 20, 1948, for the recovery of the balance of the sale price of two truckloads of bananas allegedly sold by complainant to respondent. Complainant alleges that on or about December 19, 1946, and on or about January 2, 1947, two truckloads of bananas were delivered to respondent pursuant to oral contracts between the parties, but that respondent has paid complainant only \$3,231.70 of the \$3,975.22 due in connection with these purchases. Reparation for the \$743.52 balance is requested.

A copy of the report of investigation was served by registered mail upon complainant on June 9, 1948. On June 10, 1948, a copy of the formal complaint and a copy of the report of investigation made by the Department were served by registered mail upon respondent.

On June 29, 1948, respondent filed its answer to the formal complaint. Respondent admits that there was an oral contract as alleged by complainant, but denies that the bananas delivered by complainant were of the kind, quality, grade and size specified by the contract. Respondent further denies that E. H. Lawson, the trucker employed by him to haul the bananas, had any authority to make final acceptance of the bananas, and respondent requested an oral hearing.

At complainant's request, the depositions of two witnesses were taken pursuant to proper notice at Tampa, Florida, on January 20, 1949. A formal hearing was held at Pine Bluff, Arkansas, on June 24, 1949, at which respondent's testimony was heard. Complainant's depositions were introduced in evidence at the hearing by the presiding officer at complainant's request. They were received in evidence without objection.

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

## FINDINGS OF FACT

1. Complainant, Hamilton Brothers, Inc., is a corporation whose post office address is 906 Whiting Street, Tampa, Florida.

2. Respondent is an individual, E. V. Burkett, doing business as the Burkett Fruit Company at Pine Bluff, Arkansas. At the time of the transactions complained of, respondent was licensed under the act.

3. On or about December 19, 1946, in the course of interstate commerce, the parties entered into an oral agreement for the sale by complainant to respondent of 32,235 pounds of "first class green" bananas at an agreed purchase price of 7 cents per pound, or \$2,256.45, f. o. b. Tampa, Florida. On or about the same date, and in accordance with such agreement, complainant delivered to E. H. Lawson, a driver employed by respondent, bananas of the quantity, quality, grade, size and condition called for by the contract for shipment by truck from Tampa to respondent at Pine Bluff, Arkansas, and advanced \$50, as part of the transportation cost, to the respondent's agent, Lawson.

4. Complainant made an allowance of  $\frac{1}{2}$  cent per pound on the 32,235 pounds of bananas, or \$161.18, and upon arrival of the shipment at destination, respondent accepted the bananas. On or about January 9, 1947, respondent paid complainant \$1,611.75 of the amount due in connection with this truckload of bananas, leaving an unpaid balance of \$533.52.

5. On or about January 2, 1947, in the course of interstate commerce, the parties entered into an oral agreement for the sale by complainant to respondent of 25,785 pounds of "first class green" bananas at an agreed purchase price of 7 cents per pound, or \$1,829.95, f.o.b. Tampa, Florida, which includes \$25 advanced the trucker as part of the transportation cost. On or about the same date, in accordance with such agreement, complainant delivered to E. H. Lawson, a driver employed by respondent, bananas of the quantity, quality, grade, size and condition called for by the contract for shipment by truck from Tampa to respondent at Pine Bluff, Arkansas.

6. Upon arrival of the shipment at destination, respondent accepted the 25,785 pounds of bananas; and on January 22, 1947, respondent paid to complainant \$1,619.95 of the amount due in connection with this truckload of bananas, leaving an unpaid balance of \$210.

7. Informal complaint was filed on August 29, 1947, which was within 9 months after each cause of action accrued.

## CONCLUSIONS

There is no dispute as to the terms of the contracts involved in this proceeding. On December 16, 1946 and January 2, 1947, respectively, complainant delivered two truckloads of bananas to E. H. Lawson, respondent's agent, pursuant to oral contracts between the parties which provided for the delivery of the bananas f.o.b. Tampa, Florida. E. H. Lawson was a driver employed by respondent, but in spite of some evidence to the contrary, it appears he had no authority to act as buying agent or to accept or reject bananas in behalf of respondent. The bananas were shipped to Pine Bluff, Arkansas, in trucks hired by respondent. Respondent testified that he distributed the bananas to dealers upon arrival of the produce at Pine Bluff, Arkansas.

Under the terms of the contracts, respondent had the right of inspection upon arrival before paying for the produce and, if such inspection disclosed that the produce did not meet the grade and quality specified by the contract, respondent had the additional right, within a reasonable time, to reject the produce. 7 CFR 47.2(r), 46.2(s), and 46.24(i). Respondent clearly had an opportunity to inspect and determine the acceptability of the grade and quality of the bananas prior to distributing them to dealers. However, the record does not disclose that the respondent made any effort to give the complainant notice of rejection of the produce within 6 hours after arrival of the produce at Pine Bluff, Arkansas. Obviously, respondent's action in distributing the bananas to dealers is inconsistent with rejection. Such action amounts to acceptance. *A. Bertolla and Sons v. Jack Kerzner*, 8 A. D. 754. It is concluded that respondent accepted the produce and is liable to complainant for the full contract price therefor, unless respondent can show that there was a breach of the contract by complainant in failing to deliver bananas of the kind, quality, grade, and size called for by the contract.

The burden of proof rests with respondent to show that the bananas delivered to E. H. Lawson on December 19, 1946 and January 2, 1947, did not meet the requirements of the contract. E. V. Burkett, who represented respondent at the hearing, testified as follows:

"\* \* \* on or about December of the year 1946, the Hamilton Brothers, Inc., shipped me two loads of bananas which were of inferior fruit, being such that some several thousand pounds were not ripened due to the fact that the fruit was immature. After disposing of the bananas, I mailed Mr. W. D. Hamilton a check paid in full with this exception: I deducted two cents a pound on one load of the bananas, and some forty bunches at an average weight of forty pounds to a bunch which did ripen after sending the fruit to the dealer and having it returned because it was so immature and the bananas did not have flavor or taste."

Respondent also submitted in evidence a statement signed by the driver, Sid Lawson, to the effect that the two loads of bananas in question were not of the quality that respondent had been buying and that at the time of loading he, Lawson, protested to complainant that the bananas were immature and would not please Mr. Burkett. Other than the above statements, respondent submitted no documentary or other evidence to establish the alleged unsatisfactory condition of the bananas at the time of the loading or to show the extent of the damages, if any, suffered as a result of the alleged unsatisfactory condition of the produce. Complainant offered in evidence the deposition of Evander Hamilton, Jr., vice president of the corporation, to the effect that the bananas delivered to respondent were "first class green" and that the bananas were of a grade and quality similar to bananas previously sold to respondent. In his deposition, Curtis E. Hamilton, secretary and treasurer of complainant corporation, likewise stated that the bananas delivered to respondent were similar in grade and quality to produce previously delivered to respondent. Both deponents stated that Lawson had inspected the fruit prior to loading and, in answer to the question whether Lawson rejected "any of the fruit which was submitted in either of the two shipments in controversy," each deponent answered "yes." Upon this record, we think respondent has failed to show by a preponderance of the evidence that the bananas delivered did not meet contract requirements.

It is concluded that respondent's failure to pay the balance due on the two shipments of bananas, or \$743.52, is in violation of section 2 of the act. Reparation in that amount, with interest, should be awarded complainant, and the facts should be published.

#### ORDER

Within 30 days from the date of this order, respondent shall pay to complainant as reparation the sum of \$743.52, with interest thereon at the rate of 5 percent per annum from February 1, 1947, until paid.

The facts as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2393)

**J. H. WALLACE AND SON v. PAUL'S QUALITY FRUIT MARKET. PACA**  
Doc. No. 4950. Decided March 14, 1950.

#### Failure To Pay Balance of Purchase Price

Where respondent purchased and accepted delivery of a truckload of bananas but failed to pay the full contract purchase price, and respondent's only complaint which concerned the size of the bananas was not made until



more than four months after purchase, it is held, that complainant is entitled to recover damages in the amount of the unpaid balance of the agreed purchase price.\*

*J. H. Wallace & Son, of Produce, Florida, complainant pro se. Messrs. Gregg, Thompson, Glassen & Parr, of Lansing, Michigan, for respondent. Mr. Gilbert A. Horn, Presiding Officer.*

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a proceeding under the Perishable Agricultural Commodities Act, 1930 (7 U. S. C. 1946 ed. 499a *et seq.*) for the recovery of reparation in the amount of the unpaid balance of the contract purchase price for a truckload of bananas alleged to have been sold and delivered by complainant to respondent. Informal complaint was made to the Regulatory Division, Fruit and Vegetable Branch, on December 16, 1947 and a formal complaint was filed on February 24, 1948. Respondent was served by registered mail on May 12, 1948 with a copy of the formal complaint and a copy of the report of investigation. Complainant was served by registered mail with a copy of the report of investigation on May 13, 1948.

Respondent filed an answer on May 18, 1948, admitting the purchase of the truckload of bananas as alleged in the complaint, but contending that the bananas delivered failed to meet contract requirements in that they were so small as to be almost completely unsalable. Respondent's answer includes a counterclaim for damages resulting from complainant's alleged breach of contract.

A hearing was ordered to be held at East Lansing, Michigan, on August 25, 1949, of which the parties were advised by registered mail. Neither complainant nor respondent appeared or was represented by counsel at the hearing. The presiding officer, however, formally opened the hearing at the time and place specified in the notice to the parties, and placed in the record the pleadings with all attached exhibits and the report of investigation.

### FINDINGS OF FACT

1. Complainant, J. H. Wallace and son, is a partnership composed of J. H. Wallace, Sr. and J. H. Wallace, Jr., whose post office address is Produce, Florida. At the time of the transaction herein complained of complainant was licensed under the act.

2. Respondent is an individual, Paul Falsetto, trading as Paul's Quality Fruit Market, whose post office address is 3900 South Cedar

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

Street, Lansing, Michigan. At the time of the transaction involved in this proceeding, respondent was licensed under the act.

3. On or about November 11, 1947, the parties entered into an oral agreement whereby complainant contracted in interstate commerce to sell and respondent to purchase a truckload of 27,090 pounds of stem bananas at the agreed price of 6¼ cents per pound, plus dock fees of \$15, or a total price of \$1,708.13 for the truckload, f. o. b. Miami, Florida.

4. Bananas of the kind, quality and size contracted for were shipped from Florida on or about November 11, 1947, and upon arrival at Lansing, Michigan, were received and unloaded by respondent. Respondent paid complainant \$1,050 on the purchase price, but has failed to pay complainant the remaining balance of \$658.13.

5. Formal complaint was filed on February 24, 1948, which was within nine months after the cause of action accrued.

#### CONCLUSIONS

Respondent admits in his answer that he entered into a contract with complainant for a truckload of bananas; that the bananas shipped were received and accepted by him; and that \$1,050 of the total contract price of \$1,708.13 was paid, leaving an unpaid balance of \$658.13. Respondent denies, however, that bananas of the kind, quality, size and grade contracted for were delivered to him, and contends that the fruit received was in fact of small size and for this reason it was practically unsalable.

According to the evidence contained in the report of investigation, respondent's trucker, Ralph Owens, paid complainant \$1,050 in cash at the time he took delivery of the bananas in Florida, and he also delivered respondent's check to complainant for the balance of the purchase price with the understanding that complainant was to hold the check until respondent remitted the balance by wire. The check was then to be returned to respondent. The truck driver signed a delivery ticket when he took delivery of the bananas. This delivery ticket bears the following notation: "Bal \$658.13 to be wired when load reaches Michigan." The record indicates that the parties talked by long distance telephone on Monday, November 17, 1947, at which time respondent reported that the bananas were "O. K." but still green and would be ready to remove from the ripening room on the following Wednesday or Thursday, November 19 or 20, 1947. Complainant did not receive the balance of the purchase price by Saturday, November 22nd, and attempted to call respondent by telephone but was unable to reach him. On December 5, 1947, complainant attempted to cash

the check which the truck driver had delivered to him, but payment on it was refused by the bank upon which it was drawn with the notation "NSF."

There is attached to the complaint, a letter written by respondent under date of December 31, 1947, in which he states: "I never saw anything like it. I ripened the bananas and they was a pretty yellow. Everybody came and looked nobody would take any . . . Mr. Wallace hard to believe but I never got the \$488.00 freight out the whole load. It is hard to realize and hardly believable . . . Jimmy do you have any work down there or any place else cause I have got to get a job. If you can give me a job you can take out so much each week on what I owe you . . ." There is also attached to the complaint a telegram dated January 26, 1948, sent by respondent to complainant, stating: "If I had the money would send it to you but know I lost all my trucks and everything but will pay you all up this summer."

The first indication that respondent had a complaint regarding the size of the bananas delivered to him is found in his letter of March 22, 1948, addressed to the Department, in reply to the informal complaint made by complainant. In this letter, respondent stated that complainant had agreed to send a load of good sized bananas but that the fruit which was delivered was all of small size and unsalable.

The evidence in the case as a whole leads to the definite conclusion that respondent was satisfied with the bananas at the time he accepted delivery of them. His reported telephone conversation with complainant on November 17, 1947, during which he stated that the fruit was "O. K.," and his letter of December 31, 1947, in which he stated that after ripening them the bananas were a "pretty yellow" and that he could not understand why he was unable to sell them, indicate that he was fully satisfied and accepted delivery of the shipment without objection. Furthermore, respondent freely admitted his liability to pay the balance of the contract purchase price as late as January 26, 1948. His first objection was raised in his letter to the Department dated March 22, 1948, written more than four months after delivery of the bananas. It is concluded that respondent accepted delivery of the truckload of bananas in question without objection and thereby became liable for the purchase price. If the bananas did not, in fact, meet contract requirements, respondent, by his failure to raise any objection until more than four months after accepting delivery, waived whatever right he may have had to raise this defense as a basis for damages, either to avoid payment of the balance of the purchase price or for affirmative relief. Accordingly, respondent's failure to pay the full contract purchase price was without reasonable cause and in violation of section 2 of the act. Reparation should be awarded to complain-

ant for \$658.13, plus interest. Respondent's counterclaim should be dismissed. The facts and circumstances as set forth herein should be published.

### ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation \$658.13, with interest thereon at the rate of 5 percent per annum from December 1, 1947, until paid.

Respondent's counterclaim is dismissed.

The facts as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2394)

M. ROTH & SONS v. LEO HAGGAI. PACA Doc. No. 5280. Decided March 14, 1950.

### Failure To Pay Purchase Price—Default

Where complaint alleged respondent purchased three lots of onions but failed to pay the purchase prices and where respondent failed to file an answer, held, respondent's failure to file an answer constitutes a waiver of oral hearing and an admission of the facts alleged in the complaint, and complainant should be awarded reparation for the unpaid purchase price, with interest.\*

*Messrs. Golbus & Golbus*, of Chicago, Illinois, for complainant. *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Informal complaint was received January 18, 1949. Formal complaint was filed December 15, 1949, alleging failure on the part of respondent to pay the agreed purchase prices for 3 truckloads of onions purchased during December, 1948. A copy of the report of investigation made by the Fruit and Vegetable Branch was served on complainant's attorneys January 19, 1950. On January 23, 1950, copies of the report of investigation and the formal complaint were served on respondent.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint and a waiver of oral hearing. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

### FINDINGS OF FACT

1. Complainant, M. Roth & Sons, is a partnership composed of Max Roth, Nathan Roth, and Martin Roth, whose post office address is 53 South Water Market, Chicago 8, Illinois.

2. Respondent, Leo Haggai, is an individual, whose post office address is 710 E. Lafayette Street, Tampa, Florida. At the time of the transactions complained of herein, respondent was licensed under the act.

3. On or about December 7, 1948, complainant sold to respondent 200 sacks of onions at the agreed price of \$1.33 per sack f. o. b. Michigan, or a total sales price of \$266.

4. On or about December 7, 1948, complainant sold to respondent 650 sacks of onions at \$1.30 per sack f. o. b. or a total sales price of \$845.

5. On or about December 16, 1948, complainant sold to respondent 625 sacks of onions at \$1.15 per sack f. o. b., or a total sales price of \$718.75.

6. The three lots of onions were loaded on trucks belonging to respondent and were transported by respondent, in interstate commerce, from Michigan to Florida. Respondent accepted the onions as being in conformance with the terms of the contracts.

7. On or about December 22, 1948, complainant handled for the account of respondent 918 boxes of tangerines, which were sold through auction and on which complainant realized net proceeds of \$636.79. Complainant has applied this amount towards the sum due from the respondent for onions, thus reducing the amount due complainant from respondent to \$1,192.96, no part of which has been paid.

8. Informal complaint was filed January 18, 1949, which was within nine months after the causes of action accrued.

### CONCLUSIONS

The failure of respondent to file an answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, as provided in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that complainant sold three lots of onions to respondent for a total purchase price of \$1,829.75; that respondent accepted the onions as being in conformance with the terms of the contracts; that complainant subsequently handled a truckload of tangerines for the respondent and realized net proceeds of \$636.79, which was applied to the amount due complainant for the onions; and

that respondent has paid to complainant no part of the balance of \$1,192.96. Respondent's failure to pay the amount remaining due on the agreed purchase price for the three lots of onions is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$1,192.96, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$1,192.96, with interest thereon at the rate of 5 percent per annum from January 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2395)

RUFUS PERSLEY v. PETER MICHAEL FLORIO, MORRIS ORNSTEIN, AND  
ERNEST PEPE. PACA Doc. No. 4830. Decided March 14, 1950.

### Failure To Pay Purchase Price—Principal and Agent—Undisclosed Agency— Liability of Principal and Agent

Where a buying agent bought watermelons in his own name, but failed to disclose to the seller his agency or the name of his principal, and paid a deposit at the time the contract was entered into, and the principal failed to take delivery of a major portion of the melons under the contract, it is held, in an action by the seller against the principal and the agent, that both are liable for the seller's damages, and that the seller is entitled to an award of reparation against both the principal and the agent, although a full recovery from one will bar any recovery from the other.\*

### Evidence—Contract of Purchase and Sale—Alleged Breach of Guaranty and Failure to Comply with Conditions Precedent by Seller

Where complainant-seller sold his entire crop of watermelons to respondent-buyers who took delivery of only one truckload of melons, and thereafter refused to go on with the contract or to pay complainant the balance of the purchase price on the ground that complainant failed to comply with two conditions of the contract, viz., that there would be enough ripe watermelons to load on a certain date, and that complainant would guard the fields and make sure no watermelons were taken, it is held, in an action by complainant for damages, that respondents did not rely upon the statement, if any, made

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

by complainant, since it is clear from the record that the purchaser's agent relied upon his own years of experience in the business as to probable harvesting time, and further, that the contract with complainant to guard the watermelons was a separate contract from the contract of purchase and sale, and respondents had no right to refuse to go on with the contract.\*

**Contract of Purchase and Sale Not Affected by Separate Agreement between Parties to Guard Produce until Harvested—Watchman Not Guarantor Against Theft**

Where respondent-buyers employed complainant-seller to guard the fields of watermelons purchased by the former from the latter until harvesting time, paying complainant a weekly wage for these services, and the record shows that complainant adopted reasonable precaution in guarding the melons, and there is no evidence that complainant unlawfully took any of the melons and the evidence is insufficient to establish that complainant was negligent in failing to prevent removal by others, it is held, that the mere fact that some of the melons were unlawfully taken from the fields, if they were so taken, does not establish that complainant took them or negligently allowed them to be taken, that as watchman complainant was not a guarantor against theft, and that respondent's failure to take delivery of the watermelons under the contract is a violation of the act.\*

*Mr. H. L. Pringle*, of Leesburg, Florida, for complainant. *Mr. Stanley H. Lowell*, of Lowenbraun & Lowell, of New York, New York, for respondents Ernest Pepe and Peter Michael Florio. *Mr. Julius H. Turetsky* of Levy & Hartman, of New York, New York, for respondent Morris Ornstein. *Mr. James A. O'Donnell*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). A formal complaint was filed on August 27, 1947, in which it is alleged that respondent Florio failed to pay the balance of the purchase price for a crop of watermelons bought by him from complainant on May 12, 1947. It is alleged further that respondent Florio made a down payment of \$300 at the time of the contract and that there now remains due and owing to complainant the sum of \$1,660.85, for which reparation is sought. On the basis of information that Ernest Pepe was the principal in the transaction and that Morris Ornstein was a partner of Florio, complainant joined these persons as respondents.

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

A copy of the report of investigation was served upon complainant's attorney by registered mail on October 16, 1947. On the same day, copies of the formal complaint and the report of investigation were served in like manner upon the three respondents.

Respondent, Morris Ornstein, filed an answer on November 5, 1947, denying liability in the matter on the ground that he was an employee only of respondent Pepe. Respondents Florio and Pepe filed a joint answer on November 13, 1947, alleging breach of contract by complainant in the performance of two conditions, namely, that there would be enough ripe watermelons to load a car by May 20, 1947; and that complainant would guard the field so as to make sure no watermelons were taken from it.

An oral hearing was held at New York City on September 7, 1949, at which the respondents were represented by counsel. Complainant was not represented at the hearing and no witnesses appeared to give oral testimony in his behalf. However, five depositions were received in evidence in support of complainant's contentions. Peter Michael Florio and Morris Ornstein appeared and testified. Ernest Pepe did not appear.

#### FINDINGS OF FACT

1. Complainant, Rufus Persley, is an individual whose post office address is Box 244, Route #2, Leesburg, Florida.

2. Respondent, Ernest Pepe, is an individual whose post office address is 40 Bronx Terminal Market, Bronx, New York. At the time of the transaction involved herein, this respondent was licensed under the act.

3. Respondent, Peter Michael Florio, is an individual whose post office address is 40 Bronx Terminal, Bronx, New York. At the time of the transaction involved herein, this respondent was not licensed under the act. This respondent subsequently obtained a license and paid arrearage covering the time of the transaction here involved.

4. Respondent, Morris Ornstein, is an individual whose post office address is 1809 Longfellow Avenue, Bronx, New York. At the time of the transaction involved herein, this respondent was licensed under the act.

5. During May 1947, respondents Florio and Ornstein were employed by Pepe as buying agent and buying advisor, respectively. Prior to May 12, 1947, Florio and Ornstein personally inspected on numerous occasions the fields of melons belonging to complainant.

6. On May 12, 1947, complainant sold to respondent Florio his entire crop of watermelons, comprising approximately 30 acres, then growing upon certain designated lands in Lake County, Florida.



The agreed purchase price was \$2,550. In making the purchase, Florio was acting as agent for respondent Pepe, but that fact was not disclosed to complainant. At the time of sale, Florio paid complainant \$300, with the parties agreeing that the balance of the purchase price, \$2,250, would be paid on May 25, 1947. Thereafter, and because May 25, 1947, was a Sunday, the parties agreed such balance would be paid on May 26, 1947. Complainant made no guaranty to Florio that any definite quantity of watermelons would be available for picking or shipping by May 20, 1947. It was contemplated by complainant and Florio that the melons would be shipped in interstate commerce.

7. During the period May 12 to May 24, 1947, Florio paid complainant a weekly wage to act as watchman in guarding the watermelons.

8. On or about May 24, 1947, Ornstein harvested one truckload, containing 308 melons, from the edge of complainant's field. Thereafter, on or about May 26, 1947, respondent Florio informed complainant that no further deliveries of melons would be taken by him and that complainant would not be paid the balance of the purchase price.

9. Complainant sold the balance of the melons for total gross proceeds of \$805.15 and incurred expenses of \$105 for picking, hauling and loading the melons and \$3 for his own truck. The total net amount received by complainant from his melons, including the \$300 paid by respondents, is \$997.15. There is now due and owing to complainant from respondents Ernest Pepe and Peter Michael Florio the total sum of \$1,552.85.

10. A formal complaint was filed on August 27, 1947, which was within nine months after the cause of action accrued.

### CONCLUSIONS

There is no dispute between the parties as to the contents of the bill of sale received in evidence. The bill is dated May 12, 1947, and recites a sale by complainant of his entire crop of watermelons to respondent Florio for an agreed purchase price of \$2,550. The bill is signed only by complainant. It also shows that Florio made a down payment of \$300 on the purchase price with the balance to be paid on May 25, 1947. Since this date fell on a Sunday, the parties later agreed the balance would be paid on May 26, 1947.

The joint answer filed by Florio and Pepe alleges that the agreed contract, in addition to the terms set forth in the bill of sale, called for performance of two conditions by complainant: first, that there would be enough ripe watermelons to load a car by May 20, 1947; and second, that complainant would guard the field and make sure

no watermelons were taken from it. It is respondents' position that these two conditions were not complied with, thus leaving the contract unperformed and breached on the part of complainant.

At the hearing, Florio testified that complainant agreed to have two and one-half carloads of melons ready to pick on May 20, 1947. This is at variance with his formal answer as to the number of cars to be ready for picking. Complainant's deposition testimony is to the effect that he made no promise or guaranty that any specified quantity of melons would be ready for shipment by a certain date. Complainant's testimony is corroborated by that of respondent Ornstein. This witness testified that each year for some 43 years he has been buying watermelons and patches of watermelons. It thus appears that he was well qualified by experience to determine, upon inspection, an approximate date when a field of watermelons would mature so as to be ripe for picking. Ornstein also testified that he and Florio examined complainant's field of melons about seven or eight times before the crop was purchased. In attempting to establish the date complainant allegedly told Florio the melons would be ready for picking the following colloquy occurred between the witness Ornstein and his attorney:

"Q. Did he (complainant) tell Mr. Florio or you or Mr. Florio in your presence when the first watermelons, the prime watermelons, would be ready?

"A. If we didn't buy the patch, it wouldn't be an early patch. His patch was an early patch and watermelons were scarce. We decided to pick the first pick on the 20th.

"Q. He told you the 20th of May?

"A. I know the business myself. He didn't have to tell me."

The circumstances indicate that Florio and Ornstein did not rely upon the statement, if any, made by complainant as to the probable time when the melons would be ready for picking. Upon the basis of the foregoing, it is concluded that complainant made no guaranty that the melons would be ripe for harvesting on May 20, 1947.

The second breach of the contract, according to respondents, was that complainant failed to guard the field and make sure no watermelons were taken from it. As to the agreement for watchman services, it is clear that this was a separate contract from the contract of purchase and sale. Florio testified at the hearing, under questioning of counsel:

"Q. Was it your understanding that it was part of your whole deal with him that he was to guard the field?

"A. No, I paid him separate for guarding and watching the field and working the field over. That had nothing to do with the lump sum of money I gave him. I paid him weekly every week for that."

Both Florio and Ornstein testified that many melons were found missing from the fields at the time of their inspection on May 19, 1947, and that they observed fresh truck tire prints at the edge of the field. There is evidence to the effect that they warned complainant against the loss of any more melons. According to these respondents, such a large number of melons had been removed as to require postponement of picking to May 24, 1947, and that even on that date respondents were able to pick but one truckload containing 308 melons. Respondents concede no melons were missing from the outer edges of the patch. It is their testimony, however, that once beyond the outer edges it was plain that many melons had been removed, or as Ornstein testified: "After we got to about 308 watermelons, it was like you take a knife and cut off all the field. There was nothing left, a half field."

While the testimony of Florio and Ornstein indicated they believed complainant took a large quantity of melons from the field prior to May 19th, and between that date and May 24th, they offered no evidence to link complainant with the missing melons. On the other hand, the record shows complainant adopted reasonable precautions in guarding the melons. He erected flares nightly and it is undisputed that he buried planks with upright spikes in the two roads leading into the fields for the purpose of preventing theft by use of trucks or other vehicles.

Complainant testified that he did not remove any melons, or have any knowledge of melons being stolen or removed from the fields. Two other deposition witnesses, George Persley, complainant's brother, and Jesse Smith, a neighbor residing between complainant's East and West fields, testified they saw no evidence of melons having been removed from the West field (complainant's large field) prior to their being picked by respondents on May 24, 1947. Both of these witnesses also testified that many of the melons were affected by anthracnose and blight as they reached maturity. Respondents' witnesses denied that the melons were affected by any disease.

There is no evidence that complainant unlawfully took any of the melons, and the evidence is insufficient to establish that complainant was negligent in failing to prevent removal by others. The mere fact that some of the melons were unlawfully taken from the fields, if they were so taken, does not establish that complainant took them or negligently allowed them to be taken by others. As watchman he was not a guarantor against theft. It is, therefore, concluded that respondent had no right to refuse to go on with the contract and has shown no basis for a claim against complainant for loss of melons.

After respondent's refusal to continue performance of the contract

of sale, complainant harvested and sold the crop as it ripened. The sales were as follows: June 9, 1947, 1,102 melons for \$400; June 19, 1947, 1,220 melons for \$375; and truck sales of an undisclosed number of melons for \$30.15, a total of \$805.15. Complainant states the cost of picking and hauling these melons was \$105 and he expended \$3 in using his truck. This amount appears to be reasonable and is allowed. Complainant also requests \$108 for the value of his time spent in marketing the crop, computed as 18 days at \$6 each. This amount does not appear to be justified and, therefore, is not allowed. The gross proceeds received by complainant, including \$300 paid by respondent Florio, amounted to \$1,105.15. Deducting expenses of \$108 leaves total net proceeds of \$997.15. Complainant was damaged as a result of the failure of respondent to take delivery under the contract in the amount of the difference between the contract price of \$2,550 and net proceeds of \$997.15 or \$1,552.85.

The evidence establishes that respondent Florio contracted to purchase the melons in his own name and that respondent Pepe was his undisclosed principal. Both of these respondents are liable for complainant's damages. Complainant is entitled to an award of reparation against both the principal and the agent, although a full recovery from one will bar any recovery from the other. *Denunzio Fruit Co. v. Associated Fruit Distributors and Red Lion Packing Co.*, 79 F. Supp. 117 (S. D. Cal. 1948).

Respondent Ornstein acted in this transaction as an employee of Pepe only. For this reason, the complaint as to this respondent should be dismissed.

It is concluded that the failure of respondents Ernest Pepe and Peter Michael Florio to take delivery of the watermelons under the contract was in violation of section 2 of the act. As previously stated, complainant's damages amount to \$1,552.85. Complainant should be awarded reparation in the amount of \$1,552.85, with interest, against these two respondents and the facts should be published.

#### ORDER

Within 30 days from the date of this decision respondents Ernest Pepe and Peter Michael Florio shall pay to the complainant, as reparation, \$1,552.85, plus interest thereon at 5 percent per annum from May 26, 1947, until paid.

The complaint as to respondent Morris Ornstein is dismissed.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2396)

**CROWN-CREST FRUIT CORP. v. AL KAISER & BROS., INC. AND/OR BEN AARON AND/OR BEN AARON, INC.** PACA Doc. No. 4995. Decided March 17, 1950.

**Loss Sustained on Resale of Commodity—Damages**

Where a carload of grapes was shipped by complainant-seller pursuant to a contract entered into by respondent A acting as agent for respondent B, and respondent A misinformed respondent B as to the correct terms of the contract, and, thereafter respondent B rejected the shipment as contrary to the correct terms of the contract, but respondent A assumed sole responsibility for the shipment, and with complainant's assent and without notice to respondent B, respondent A undertook to resell the shipment and such resale resulted in a loss, it is held, that respondent B's rejection of the grapes was in violation of the act, but since complainant and respondent A entered into a new contract for the resale of the grapes which absolved respondent B from further liability, reparation should be awarded against respondent A for the loss incurred on resale of the grapes.\*

**Principal and Agent—Buyer Bound by Its Agent's Misstatements**

Where parties are bound by the terms of the contract, any false and misleading statements made to buyer by its agent in negotiating the sale are no defense in an action by seller for the balance of the purchase price following resale after rejection.\*

*Mr. John W. Guerard*, of Rowell and Guerard, of Fresno, California, for complainant. *Messrs. Golbus & Golbus*, of Chicago, Illinois, for respondent *Al Kaiser & Bros., Inc.*, and *Ben Aaron and Ben Aaron, Inc.*, of Watsonville, California, respondents *pro se*. *Mr. Gilbert A. Horn*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Informal complaint was made to the Regulatory Division, Fruit and Vegetable Branch, on October 8, 1947, and a formal complaint was filed March 10, 1948, in which it is alleged that complainant sold respondent a carload of seedless grapes on the basis "California acceptance final" which respondent wrongfully rejected upon arrival at destination, causing complainant damages in the amount of \$1,381.63.

A copy of the report of investigation made by the Regulatory Division was served by registered mail on respondent *Al Kaiser & Bros.*,

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

Inc., on June 10, 1948, together with a copy of the formal complaint. Copies of the same documents were served on respondents Ben Aaron and Ben Aaron, Inc., by registered mail on June 15, 1948. A copy of the report of investigation was also served on complainant by registered mail on June 14, 1948.

Respondent Al Kaiser & Bros., Inc., filed an answer to the formal complaint on July 1, 1948, denying the terms of sale as alleged by complainant and alleging that the sale had in fact been made on a guaranteed U. S. No. 1 on arrival Kansas City basis. Kaiser alleged further that the shipment was inspected upon arrival at Kansas City and failed to meet the grade requirements of the contract and was therefore rejected to the shipper.

Respondents Ben Aaron, Inc., and Ben Aaron filed a joint letter on July 21, 1948, demanding an oral hearing, which was received in lieu of answer.

An oral hearing was held at Chicago, Illinois, on March 31, 1949, at which Mr. Thomas F. Wilson, general manager of complainant corporation, appeared and testified on behalf of complainant. Respondent Al Kaiser & Bros., Inc., was represented by counsel and Al Kaiser testified as a witness. Respondents Ben Aaron, Inc., and Ben Aaron were not represented at the hearing, but the deposition of Ben Aaron was subsequently received on their behalf.

#### FINDINGS OF FACT

1. Complainant, Crown-Crest Fruit Corp., is a corporation whose address is P. O. Box 212, Sanger, California.

2. Respondent Al Kaiser & Bros., Inc., is a corporation whose address is 216 South Water Market, Chicago, Illinois. Respondent Ben Aaron, Inc., is a corporation whose address is Fresno, California. Respondent Ben Aaron is an individual, also of Fresno, California. At the time of the transaction herein involved, respondent Al Kaiser & Bros., Inc., and Ben Aaron, Inc., were licensed under the act. Respondent Ben Aaron was not licensed as an individual.

3. On or about August 11, 1947, in the course of interstate commerce, Ben Aaron, acting as agent for Al Kaiser & Bros., Inc., purchased 1,100 lugs of U. S. No. 1 Table grade Thompson Seedless Grapes for \$1.45 per lug, plus \$25 precooling charge, or a total purchase price of \$1,620, on the basis of "California acceptance final." At the time of the transaction, a written memorandum of sale containing all of the aforementioned terms of sale was signed by Ben Aaron as authorized agent for Al Kaiser & Bros., Inc.

4. The shipment was officially inspected at shipping point on August 11, 1947, and certified as U. S. No. 1 Table grade.

5. On or about August 11, 1947, complainant billed 1,100 lugs of U. S. No. 1 Table grade Thompson Seedless Grapes, contained in car ART 24136, to Al Kaiser & Bros. at Kansas City, Missouri. On August 13, 1947, Al Kaiser & Bros., Inc., sold the shipment to the E. E. Fadler Co. at Kansas City, Missouri, on the terms "U. S. No. 1 on Arrival Kansas City guaranteed," and ordered the car diverted to this purchaser.

6. Upon arrival of the shipment at Kansas City, Missouri, on August 18, 1947, the E. E. Fadler Company obtained a Federal inspection of the grapes which showed 2 percent shattering, 2 to 20 percent, averaging approximately 5 percent raisining, and averaging one-half of 1 percent decay. The inspection was restricted to the two upper layers of the shipment. The grade of the grapes was certified as follows: "Now fails to grade U. S. No. 1 Table only account raisining." The E. E. Fadler Company notified Al Kaiser & Bros., Inc., that the car was rejected for failure to meet the grade guarantee. Al Kaiser & Bros., Inc., instructed the E. E. Fadler Company to divert the car to Al Kaiser & Bros., Inc., at Chicago, Illinois.

7. On August 21, 1947, Al Kaiser & Bros., Inc., ordered the car, which was then at Chicago, Illinois, reconsigned to complainant, and notified complainant that the shipment was rejected and the draft thereon refused due to the failure of the grapes to meet the grade requirements of the contract at Kansas City.

8. At Ben Aaron's request, complainant diverted the car to the Steel City Fruit Company, Pittsburgh, Pennsylvania, for sale on consignment for the account of Ben Aaron, Inc. A check for the net proceeds, in the amount of \$238.37, was forwarded to Ben Aaron, Inc., which, in turn, endorsed it to complainant.

9. Formal complaint was filed on March 10, 1948, which was within 9 months after the accrual of the cause of action.

### CONCLUSIONS

It is the contention of the respondents that complainant guaranteed the shipment to be U. S. No. 1 grade on arrival at Kansas City, Missouri, and since it failed to meet this grade, they were privileged to reject the shipment and are free from liability on the contract. However, the written memorandum of the contract, signed by Ben Aaron as agent for Al Kaiser & Bros. on August 11, 1947, not only did not contain the alleged guarantee, but specified the terms of sale to be "f. o. b. Sanger California Acceptance Final." The respondents are bound by the terms of the written memorandum, despite the testimony of Ben Aaron that he considered his signing thereof a mere formality.

Witness Thomas F. Wilson testified that several days after the sale was consummated, Aaron came to him and said that he was having some trouble with Kaiser on the grape deal, and requested Wilson to write or wire Kaiser that any carload then enroute had been purchased on a guaranteed U. S. No. 1 on arrival basis. Wilson testified that he refused to comply with this request, but stated that he would stand behind complainant's general policy of protecting the purchaser in any case where the shipping point inspection is reversed as to grade by an appeal inspection at destination. This general guarantee cannot be said to be an oral modification of the written contract in this case. Moreover, there was no *reversal* of the shipping point inspection on this carload, and thus the guarantee is without significance.

Respondent Al Kaiser & Bros., Inc., was not knowingly responsible for the breach of contract in this case. Kaiser's action throughout appears to have been induced by false and erroneous information furnished by its agent, Aaron. After Aaron had purchased the grapes on a California Acceptance Final basis, he wired Kaiser that he had purchased them on a guaranteed U. S. No. 1 on arrival Kansas City basis. With this information in hand, Kaiser resold the shipment to the E. E. Fadler Company and guaranteed the grapes to grade U. S. No. 1 on arrival at Kansas City. The shipment failed to meet the grade at Kansas City and Fadler rejected it. Kaiser then talked with Aaron by telephone and Aaron instructed Kaiser to have Fadler divert the car to Kaiser at Chicago to be sold on consignment for complainant's account. Here again Aaron misinformed his principal, Kaiser, by advising him that complainant was willing to have the car disposed of in this manner. After the car arrived at Chicago, Kaiser, still unaware of the actual terms of sale, reconsigned the shipment to complainant and notified complainant that it was rejected for failure to meet the grade requirements of the contract at Kansas City. Kaiser had nothing to do with the subsequent diversion and disposition of the shipment.

Despite Kaiser's innocent position in the transaction, it is, nonetheless, responsible for the acts of its agent while acting within the scope of his authority. Thus it is bound by Aaron's purchase of the shipment on the basis of "California Acceptance Final" even though Aaron reported that the purchase had been made on different terms. However, Kaiser is not bound by Aaron's subsequent acts which were beyond the scope of his authority, as will be subsequently discussed.

Ben Aaron is admitted by Kaiser to have been its agent to purchase grapes. Aaron had purchased a number of shipments of grapes from complainant prior to the one involved in this proceeding for Kaiser's account, all of which were accepted and paid for by Kaiser. At no



time, however, did Kaiser advise complainant, or give complainant reason to believe that Aaron's agency extended beyond the power to purchase. The form of contract memorandum customarily executed by Aaron and complainant indicates Aaron had authority to "purchase" from complainant for Kaiser's account. Aaron had no authority, either actual or apparent, to dispose of shipments which Kaiser had rejected. Thus Aaron's further action in disposing of the shipment was not binding on Kaiser and Kaiser is not responsible for any loss sustained as a result thereof.

When Kaiser notified complainant that the shipment was rejected and the draft refused, complainant went to Aaron to discuss the further disposition of the grapes. No demand was made on Kaiser at that time either to accept the produce, or to pay the purchase price. Aaron requested complainant to order the car sent to the Steel City Fruit Company at Pittsburgh, Pennsylvania, to be sold for the account of Ben Aaron, Inc. This was done without the knowledge or consent of Kaiser, nor did complainant make any effort to advise Kaiser thereof. As previously stated, it appears that Kaiser's rejection of the shipment resulted from having been misinformed by its agent, Aaron, as to the true terms of the contract. After rejection, Aaron assumed full responsibility for the disposition of the car, not as agent for Kaiser, but solely for the account of Ben Aaron, Inc. Moreover, complainant assented to the assumption of responsibility by Ben Aaron, Inc., by shipping the grapes to Pittsburgh for sale for the account of Ben Aaron, Inc., at Ben Aaron's request, and by making no effort to obtain compliance with the contract from Kaiser. It is concluded that a new agreement was entered into between complainant and Aaron whereunder complainant accepted the sole responsibility of Ben Aaron, Inc., for the breach of the original contract. It follows that Kaiser is absolved from any liability for its breach of contract and the complaint should be dismissed as to respondent Kaiser.

According to the testimony presented by the respondents, this shipment was purchased by Aaron, not solely as agent for Kaiser, but for the joint account of Kaiser and Ben Aaron, Inc. Thus, Ben Aaron, Inc., was a co-purchaser of the shipment and as such was responsible for the payment of the purchase price. As pointed out above, by subsequent agreement between Aaron and complainant, sole responsibility for the transaction was assumed by Ben Aaron, Inc. Moreover, by ordering complainant to divert the car from Chicago to Pittsburgh for sale for the account of Ben Aaron, Inc., said respondent assumed control over the disposition of the shipment, and cannot be heard to complain of the adequacy of the price obtained on the resale thereof.

It is concluded that the failure of respondent Ben Aaron, Inc., to pay the full purchase price for the shipment of grapes here involved was a violation of section 2 of the act. Respondent Ben Aaron, Inc., should be ordered to pay complainant reparation in the amount of the contract price of \$1,620 less the sum of \$238.37, heretofore paid complainant, plus interest. It is further concluded that the complaint against Ben Aaron individually should be dismissed because in his dealings he was acting not for his individual account but as an officer of respondent Ben Aaron, Inc. The facts and circumstances should be published.

### ORDER

Within 30 days from the date of the issuance of this order, respondent Ben Aaron, Inc., shall pay to complainant the sum of \$1,381.63, with interest thereon at 5 percent per annum from September 1, 1947, until paid.

The complaint with respect to respondents Al Kaiser & Bros., Inc., and Ben Aaron is hereby dismissed.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2397)

FLORIDA PLANTERS, INC. v. GARNER PRODUCE COMPANY. PACA Doc. No. 5282. Decided March 17, 1950.

### Failure To Pay Purchase Price—Default

Where complaint alleged that respondent failed to pay the purchase prices for three truckloads of cabbage and where respondent failed to file an answer to the complaint, it is held, that failure to file an answer constitutes a waiver of hearing and an admission of the facts alleged in the complaint, and respondent's failure to pay the purchase price is in violation of the act, and complainant should be awarded reparation in the amount due with interest.\*

*Mr. G. Eugene Ivcy*, of Atlanta, Georgia, and *Mr. Julian C. Cathoun*, of Palatka, Florida, for complainant. *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Informal complaint was filed July 18, 1949, and a formal complaint was filed November 30, 1949, alleging that during December 1948,

\*Reference to other points involved in this case will be found in Index-Digest and subject-Index in this issue of Agriculture Decisions.—Ed.

and January 1949, complainant sold and delivered to respondent three truckloads of cabbage for a total purchase price of \$1,100.65, but that respondent has failed to pay any part of the purchase price. A copy of the report of investigation made by the Regulatory Division, Fruit and Vegetable Branch, was served on complainant's counsel February 16, 1950. A copy of the formal complaint and a copy of the report of investigation were served on respondent February 15, 1950.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint and a waiver of oral hearing. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

#### FINDINGS OF FACT

1. Complainant, Florida Planters, Inc., is a corporation whose post office address is Hastings, Florida.

2. Respondent, William Allen Garner, is an individual, trading as Garner Produce Company, whose post office address is 1050 Murphy S. W., Atlanta, Georgia. At the time of the transactions involved in this proceeding, respondent was not licensed but was subject to license under the act. Respondent previously had a license which terminated May 28, 1948.

3. On or about December 27, 1948, complainant sold to respondent 543 50-pound mesh printed bags of U. S. No. 1 green cabbage at 60 cents per bag, f. o. b., or a total purchase price of \$325.80.

4. On or about December 29, 1948, complainant sold to respondent 593 50-pound mesh printed bags of U. S. No. 1 green cabbage at 60 cents per bag, f. o. b., or a total purchase price of \$355.80.

5. On or about January 6, 1949, complainant sold to respondent 493 50-pound mesh printed bags of approximately 85% U. S. No. 1 green cabbage at 85 cents per bag, f. o. b., or a total purchase price of \$419.05.

6. Complainant delivered and respondent accepted delivery of three lots of cabbage which met contract requirements. Respondent transported the cabbage in interstate commerce from Hastings, Florida, to Atlanta, Georgia. Respondent has made no payment to complainant on account of these transactions, and owes complainant \$1,100.65.

7. Informal complaint was filed July 18, 1949, which was within nine months after the causes of action accrued.

### CONCLUSIONS

Failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, as provided for in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that the complainant sold three lots of cabbage to respondent for a total purchase price of \$1,100.65; that complainant delivered and respondent accepted delivery of cabbage which complied with the terms of the contracts; and that respondent has not paid the total purchase price of \$1,100.65, or any part thereof. Respondent's failure to pay the contract prices for the three lots of cabbage is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$1,100.65, with interest and the facts should be published.

### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$1,100.65, with interest thereon at the rate of 5 percent per annum from February 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2398)

PACA Doc. No. 4923\* Decided March 20, 1950.

#### **Stay Order—Extension of Time To File Petition for Reconsideration**

Where complainant's counsel requested an extension of time to file a petition for reconsideration, and an extension has been granted, the order issued in the proceeding is stayed pending issuance of another order.

*Messrs. Gallup & Hadley*, of Boston, Massachusetts, for complainant.

*Decision by Thomas J. Flavin, Judicial Officer*

### STAY ORDER

On February 24, 1950, an order was issued dismissing the complaint in this proceeding. By letter dated March 2, 1950, complainant's counsel filed what is construed as a request for an extension of time in which to file a petition for reconsideration and an extension of time has been granted. The order of February 24, 1950, is hereby stayed, pending the issuance of another order in this proceeding.

Copies hereof shall be served upon the parties.

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\*As explained in Prefatory Note, the identities of the parties are not disclosed.—Ed.

(No. 2399)

LOUIS L. JACOB, INC. v. SHOWKER BROS., INC. PACA Doc. No. 5284.  
Decided March 22, 1950.

### Failure To Pay Balance of Purchase Price—Default

Where complainant alleged respondent failed to pay the full purchase price for a truckload of oranges and grapefruit, and where respondent failed to file an answer, held, respondent's failure to file an answer constitutes an admission of the allegations in the complaint and a waiver of oral hearing, and respondent's failure to pay the full purchase price is a violation of the act for which complainant should be awarded reparation.\*

*Louis L. Jacob, Inc.*, of Orlando, Florida, complainant *pro se*. *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Formal complaint was filed January 25, 1950, alleging that complainant sold a truckload of oranges and grapefruit to respondent on or about October 15, 1949, for a total purchase price of \$1,500, and that respondent paid \$750 but has failed to pay the balance of \$750. A copy of the report of investigation made by the Fruit and Vegetable Branch, was served upon complainant on February 4, 1950. A copy of the report of investigation and a copy of the formal complaint were served upon respondent on February 3, 1950.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint and a waiver of oral hearing. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

### FINDINGS OF FACT

1. Complainant, Louis L. Jacob, Inc., is a corporation whose address is 1251 Atlanta Avenue, Orlando, Florida.

2. Respondent, Showker Bros., Inc., is a corporation whose address is 31 Gray Street, Harrisonburg, Virginia. At the time of the transaction complained of herein, respondent was licensed under the act.

3. On or about October 15, 1949, complainant contracted to sell to respondent 275 boxes of grade U. S. No. 1 oranges for \$1,050 and 150

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

boxes of grade U. S. No. 1 Duncan grapefruit for \$450. The total purchase price was \$1,500, f. o. b. Orlando, Florida.

4. On October 25, 1949, complainant shipped oranges and grapefruit which met the contract specifications, in interstate commerce, from Orlando, Florida, to respondent at Harrisonburg, Virginia.

5. Respondent accepted delivery of the oranges and grapefruit and paid complainant \$750, but has not paid the balance of \$750 or any part thereof.

6. Formal complaint was filed January 25, 1950, which was within nine months after the cause of action accrued.

### **CONCLUSIONS**

Failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing as provided for in the rules of practice (7 CFR 47.8 (c)).

The record in this proceeding indicates that respondent has never questioned the validity of complainant's claim. It appears that shortly after arrival of the shipment, respondent sent to complainant a check in the amount of \$1,500 in full payment of the purchase price. However, this check was returned unpaid because of insufficient funds. On January 7, 1950, respondent sent to complainant a Western Union money order for \$750, as part payment. Respondent's failure to pay the balance of the purchase price is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$750, with interest, and the facts should be published.

### **ORDER**

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$750, with interest thereon at the rate of 5 percent per annum from November 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2400)

**TORVIG SEALANDER FRUIT, INC. v. L. D. ROBINSON COMPANY. PACA  
Doc. No. 5285. Decided March 22, 1950.**

### **Failure To Pay Purchase Price—Default**

Where complainant alleged that respondent failed to pay the agreed purchase prices for two shipments of apples, and where respondent failed to file an

answer, held, failure to file an answer constitutes an admission of the allegations in the complaint and a waiver of oral hearing, and respondent's failure to pay the balance of the purchase price is a violation of the act for which complainant should be awarded reparation.\*

*Torvig Sealander Fruit, Inc.*, of Yakima, Washington, complainant *pro se*. Mr. E. D. Mulville, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

#### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Informal complaint by letter was received December 5, 1949. Formal complaint was filed January 17, 1950, alleging that during March 1949, complainant sold two shipments of apples to respondent for a total purchase price of \$6,088.75 and that respondent paid \$1,000, leaving an unpaid balance of \$5,088.75. A copy of the report of investigation made by the Fruit and Vegetable Branch was served on complainant February 7, 1950. On the same date, copies of the report of investigation and the formal complaint were served on respondent.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint and a waiver of oral hearing. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

#### FINDINGS OF FACT

1. Complainant, Torvig Sealander Fruit, Inc., is a corporation whose post office address is 616 South First Street, Yakima, Washington.

2. Respondent, L. D. Robinson Company, is a partnership composed of Leroy D. Robinson, and Joseph J. Crosetti, whose address is 510 Battery Street, San Francisco, California. At the time of the transaction complained of herein, respondent was licensed under the act.

3. On or about March 8, 1949, complainant sold to respondent 400 boxes of Red Delicious Combination Extra Fancy and Fancy apples, 138 size and larger, and 25 boxes of place packed Red Delicious Extra Fancy apples, generally 138 size and larger, at the agreed price of \$5.35 per box, delivered at Oakland, California, or for a total sales price of \$2,273.75.

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

4. On or about March 9, 1949, complainant shipped, in interstate commerce, from Yakima, Washington, to respondent at Oakland, California, 425 boxes of apples which conformed with the terms of the contract of March 8, 1949, as to grade, quality, kind and size.

5. On or about March 14, 1949, complainant sold to respondent 500 boxes of Combination Extra Fancy and Fancy Red Delicious apples, 138 size and larger, and 200 boxes of place packed Combination Extra Fancy and Fancy Red Delicious apples, generally 138 size and larger, at the agreed price of \$5.45 per box, delivered at Oakland or San Francisco, California, or an equivalent distance, or for a total sales price of \$3,815.

6. On or about March 15, 1949, the complainant shipped, in interstate commerce, from Yakima, Washington, to respondent at San Francisco, California, 700 boxes of apples of the grade, kind, quality, and size called for in the contract of March 14, 1949.

7. Upon arrival of the two shipments of apples at destination, respondent accepted them as being in compliance with the terms of the contracts but has paid the complainant only \$1,000, leaving a balance due on the two contracts of \$5,088.75.

8. Informal complaint was received December 5, 1949, which was within 9 months after the causes of action accrued.

### CONCLUSIONS

The failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, as provided for in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that complainant sold two shipments of apples to respondent during March 1949 for a total purchase price of \$6,088.75; that complainant delivered apples which complied with the terms of the contract; that respondent accepted delivery without complaint; and that respondent has paid only \$1,000 to the complainant, leaving an unpaid balance of \$5,088.75. The record indicates that respondent admits liability for the full amount claimed by complainant, and that the only reason for nonpayment has been financial difficulties on the part of respondent. Respondent's failure to pay promptly the full amount for the two shipments of apples is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$5,088.75, with interest, and the facts should be published.



## ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$5,088.75, with interest thereon at the rate of 5 percent per annum from April 1, 1949, until paid.

The facts and circumstances set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2401)

VISCONTI BROS. *v.* ALFRED SCHIANO. PACA Doc. No. 5287. Decided March 22, 1950.

**Failure To Pay Purchase Price—Default**

Where complainant alleged that it sold grapes to respondent and that respondent did not pay the full purchase price, and where respondent failed to file an answer, held, failure to file an answer constitutes an admission of the allegations in the complaint and a waiver of oral hearing, and respondent's failure to pay the full purchase price is a violation of the act for which complainant should be awarded reparation for the balance of the purchase price.\*

*Visconti Bros.*, of Binghamton, New York, complainant *pro se.* *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Informal complaint was received July 18, 1949. Formal complaint was filed January 9, 1950, alleging that complainant sold grapes to respondent for a purchase price of \$1,470 in October 1948, and that respondent failed to pay the purchase price or any part thereof. A copy of the report of investigation, made by the Fruit and Vegetable Branch, was served on complainant February 9, 1950. On the same date, copies of the report of investigation and the formal complaint were served on respondent.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

alleged in the complaint and a waiver of oral hearing. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

#### FINDINGS OF FACT

1. Complainant, Visconti Bros., is a partnership composed of John Visconti and Dominick Visconti, whose post office address is 210 Henry Street, Binghamton, New York.

2. Respondent, Alfred Schiano, is an individual, whose post office address is R. F. D. #1, Exeter Avenue and Buckley Road, Liverpool, New York. At the time of the transaction complained of herein, respondent was not licensed under the act but was subject to license. He subsequently filed application, paid the required fee and arrearage for 3 years, and license No. 122704 was issued to him on July 22, 1949.

3. On or about October 19, 1948, in the course of interstate commerce, complainant sold to respondent 700 boxes of Zinfandel grapes at \$2.10 per box, f. o. b. Binghamton, New York.

4. In accordance with the terms of the contract, grapes in car PFE 96779 which had been shipped in interstate commerce from California to complainant at Binghamton, New York, were delivered by complainant to respondent.

5. Respondent accepted the grapes as conforming with the terms of the contract but has not paid complainant the purchase price of \$1,470 or any part thereof.

6. Informal complaint was received July 18, 1949, which was within nine months after the cause of action accrued.

#### CONCLUSIONS

Failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing as provided for in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that complainant sold and delivered to respondent 700 boxes of Zinfandel grapes at \$2.10 per box, f. o. b. Binghamton, New York, or for a total purchase price of \$1,470; that respondent accepted the grapes as being in conformance with the terms of the contract; and that respondent has not paid the purchase price or any part thereof. The report of investigation shows that respondent admits his liability on the transaction complained of herein. Respondent's failure to pay the agreed purchase price is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$1,470, with interest, and the facts should be published.

**ORDER**

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$1,470, with interest thereon at the rate of 5 percent per annum from November 1, 1948, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2402)

**ASSOCIATED GROWERS OF BROWNSVILLE v. L. D. ROBINSON COMPANY.**  
PACA Doc. No. 5295. Decided March 27, 1950.

**Failure To Pay Purchase Price—Default**

Where complainant alleged that it sold 600 sacks of potatoes to respondent and respondent failed to pay the agreed purchase price, and where respondent failed to file an answer, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, and respondent's failure to pay the agreed purchase price is in violation of section 2 of the act for which respondent is ordered to pay to complainant, as reparation, an amount equal to the purchase price, with interest.\*

*Associated Growers of Brownsville*, of Brownsville, Texas, complainant *pro se*.  
*Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Informal complaint was received November 9, 1949. Formal complaint was filed January 17, 1950, alleging that complainant sold 600 sacks of potatoes to respondent in April 1949 but that respondent failed to pay the purchase price in violation of section 2 of the act. Copies of the report of investigation made by the Regulatory Division of the Fruit and Vegetable Branch were served on complainant February 18, 1950, and on respondent February 20, 1950. A copy of the formal complaint was also served on respondent on February 20, 1950.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

in the complaint and a waiver of oral hearing. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

#### FINDINGS OF FACT

1. Complainant, Associated Growers of Brownsville, is a corporation whose address is P. O. Box 1151, Brownsville, Texas.

2. Respondent, L. D. Robinson Company, is a partnership composed of Leroy D. Robinson and Joseph J. Crosetti, whose address is 510 Battery Street, San Francisco, California. At the time of the transaction complained of herein, respondent was licensed under the act.

3. On or about April 13, 1949, complainant sold to respondent 300 sacks of U. S. No. 1, 17/8" potatoes at \$2.35 per sack and 300 sacks of U. S. No. 1, Size B, potatoes at \$1.75 per sack, f. o. b. Brownsville, Texas, or for a total sales price of \$1,230.

4. On or about April 13, 1949, 600 sacks of potatoes of the kind, grade, quality, and size specified in the contract were shipped in interstate commerce from Brownsville, Texas, to respondent in San Francisco.

5. Respondent accepted the potatoes but has not paid the purchase price or any part thereof.

6. Informal complaint was received on November 9, 1949, which was within nine months after the cause of action accrued.

#### CONCLUSIONS

Failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing as provided in the rules of practice (7 CFR 47.8(c)).

The facts thus admitted are that complainant sold 600 sacks of potatoes to respondent on or about April 13, 1949, for a purchase price of \$1,230; that potatoes meeting contract requirements were shipped in interstate commerce to respondent; that respondent accepted the potatoes as conforming with the terms of the contract; and that respondent has not paid the purchase price of \$1,230, or any part thereof.

It appears from information contained in the record in this proceeding that respondent acknowledges the debt and that respondent gave complainant a check dated December 29, 1949, for \$400, but that the check was returned unpaid as the bank account was previously closed.

Respondent's failure to pay the purchase price of \$1,230, is in violation of section 2 of the act. Complainant should be awarded repayment in the amount of \$1,230, with interest, and the facts should be published.

**ORDER**

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$1,230, with interest thereon at the rate of 5 percent per annum from May 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2403)

**ERNEST E. FADLER COMPANY v. ORLANDO PRODUCE COMPANY. PACA**  
Doc. No. 5296. Decided March 27, 1950.

**Failure To Pay Balance of Purchase Price—Default**

Where complainant alleged that it sold a carload of tomatoes to respondent and respondent failed to pay the full purchase price, and where respondent failed to file an answer, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, and respondent's failure to pay the balance of the purchase price is in violation of the act for which complainant is entitled to an award of reparation in the amount of the purchase price.\*

*Mr. Warren S. Earhart*, of Kansas City, Missouri, for complainant, *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Formal complaint was filed December 16, 1949, alleging that complainant sold to respondent a carload of Mexican tomatoes for \$1,912.50, less freight charges of \$671.01, or a net sales price of \$1,241.49, only \$100 of which has been paid by respondent, leaving a balance due of \$1,141.49. An investigation was made by the Regulatory Division of the Fruit and Vegetable Branch and a copy of the report of its investigation was served upon complainant's attorney on February 16, 1950. On the same date, copies of the report of investigation and the formal complaint were served upon respondent.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice,

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

failure to file an answer would constitute an admission of the facts alleged in the complaint and a waiver of oral hearing. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

#### FINDINGS OF FACT

1. Complainant, Ernest E. Fadler Company, is a corporation whose post office address is Produce Exchange Building, Kansas City 6, Missouri.

2. Respondent is an individual, Carlo Orlando, trading as Orlando Produce Company, whose post office address is 510 Harrison, Kansas City, Missouri. At the time of the transaction complained of herein, respondent was licensed under the act.

3. On or about April 25, 1949, complainant sold to respondent the 765 lugs of Mexican tomatoes contained in car PFE 43508, then on track at Kansas City, Missouri, after inspection of the tomatoes by respondent. The agreed price was \$2.50 per lug, delivered at Kansas City, or \$1,912.50 for the carload, less freight of \$671.01, or a net price to complainant of \$1,241.49.

4. The purchase and sale transaction here involved was one in the course of interstate or foreign commerce, car PFE 43508 having been shipped from Culiacan, Sinaloa, Mexico, on April 16, 1949, crossing at Nogales, Arizona, on April 19, 1949, and arriving at Kansas City on or about April 25, 1949. At the time of sale the tomatoes were in the original lugs, loaded as originally shipped.

5. Complainant delivered the carload of tomatoes to respondent on the day of sale by delivering to the carrier a diversion order. Respondent accepted delivery of the tomatoes pursuant to the contract and unloaded them from the car.

6. On June 1, 1949, respondent paid complainant \$100 on the purchase price, but has paid no part of the balance of \$1,141.49 due complainant.

7. Formal complaint was filed December 16, 1949, which was within nine months after the cause of action accrued.

#### CONCLUSIONS

Failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, as provided for in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that complainant sold to respondent, after inspection by respondent, 765 lugs of Mexican tomatoes for a

net sales price of \$1,241.49; that the transaction was in interstate commerce; that the tomatoes were delivered to and accepted by respondent; and that respondent paid complainant only \$100, leaving a balance due of \$1,141.49, no part of which has been paid. Respondent's failure to pay the agreed purchase price is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$1,141.49, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$1,141.49, with interest thereon at the rate of 5 percent per annum from May 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2404)

**LITCHARD, SCHULTHEIS & JOHNSON, INC. v. GILMORE PRODUCE. PACA**  
Doc. No. 5288. Decided March 27, 1950.

### Failure To Pay Balance of Purchase Price—Default

Where complaint alleged that respondent failed to pay complainant the balance of the purchase price for potatoes sold to respondent, and where respondent did not file an answer, held, respondent's failure to file an answer constitutes an admission of the allegations in the complaint, and a waiver of oral hearing, and complainant is entitled to an award of reparation in the amount set forth in the complaint.\*

*Litchard, Schultheis & Johnson, Inc.*, of Wellsville, New York, complainant *pro se*.  
*Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Formal complaint was filed January 25, 1950, alleging failure on the part of respondent to pay the full purchase price for a truckload of potatoes sold by complainant to respondent in June 1949. The Regulatory Division of the Fruit and Vegetable Branch made an investigation and a copy of its report thereon was served on complainant February 13, 1950. On February 14, 1950, copies of the report of investigation and the formal complaint were served on respondent.

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint and a waiver of oral hearing. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

#### FINDINGS OF FACT

1. Complainant, Litchard, Schultheis & Johnson, Inc., is a corporation whose address is 56 North Main Street, Wellsville, New York.

2. Respondent, Harold L. Gilmore, is an individual, trading as Gilmore Produce, whose address is 512 Chestnut Street, Johnstown, Pennsylvania. At the time of the transaction complained of herein, respondent was licensed under the act.

3. On or about June 7, 1949, complainant sold to respondent 300 bags of U. S. No. 1, Size A, potatoes at \$3.50 per bag delivered.

4. On or about June 7, 1949, complainant shipped by truck, in interstate commerce, from Gregory, North Carolina, to respondent at Johnstown, Pennsylvania, 300 bags of potatoes which conformed with the terms of the contract as to grade, quality, kind and size.

5. Respondent accepted the potatoes in compliance with the contract and paid complainant \$525, leaving a balance due of \$525, no part of which has been paid.

6. Formal complaint was filed January 25, 1950, which was within nine months after the cause of action accrued.

#### CONCLUSIONS

Failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, as provided for in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that complainant sold 300 bags of U. S. No. 1, Size A, potatoes to respondent for a total purchase price of \$1,050; that complainant shipped potatoes which met contract requirements; that respondent accepted the potatoes; and that respondent has paid complainant \$525, leaving an unpaid balance of \$525. The report of investigation shows that respondent forwarded a check to complainant for the full amount of the purchase price in August 1949, but stopped payment thereon without giving any reason. In a letter to the Fruit and Vegetable Branch dated December 2, 1949, respondent agreed to pay the balance due by January 31, 1950, but no payment has been made. Respondent's



failure to pay the full purchase price is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$525, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation \$525, with interest thereon at the rate of 5 per cent per annum from July 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2405)

GEORGE COVERT *v.* NATIONAL PRODUCE COMPANY. PACA Doc. No. 4794. Decided March 28, 1950.

### Dismissal of Petition for Reconsideration

Where the presiding officer properly excluded testimony concerning sales made by the shipper of onions sold as "Jumbos" at destination markets, the evidence supported the conclusion that the term "Jumbo" was used by the parties to mean onions 3 inches and larger in diameter and showed the percentage of undersized onions delivered exceeded the permissible tolerance, held, that respondent's petition for reconsideration should be dismissed on the ground that the evidence supports the prior order of May 4, 1949.\*

*Messrs. Chadeayne & Wilkinson*, of Tracy, California, and *Mr. John J. Toohey*, of Chicago, Illinois, for complainant.

*Decision by Thomas J. Flavin, Judicial Officer*

### ORDER DISMISSING PETITION FOR RECONSIDERATION

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C., 1946 ed., 499a *et seq.*). Complainant sought reparation in the amount of \$2,419.65, representing damages which he alleged he suffered by reason of respondent's rejection without reasonable cause of three carloads of onions. In answer to the complaint, respondent alleged that the first of the three cars shipped by complainant was not in suitable shipping condition, and that the onions contained in the two remaining cars did not meet contract requirements as to kind, size, and quality. On May 4, 1949,\*\* an order was entered in the proceeding in which it was concluded that respondent had failed to prove that the onions in the first car (FGEX 34761) were not in suitable condition at the time of shipment, and that complainant had failed to prove that the onions in the two remaining cars (FGEX 16222 and PFE 43104) were "Jumbo" onions

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

\*\*8 A. D. 557.

as contracted for. Respondent was ordered to pay complainant, as reparation, \$924.61, plus interest.

The order of May 4, 1949, was served upon complainant on May 10, 1949. On May 18, 1949, which was within the time provided by the rules of practice, complainant filed a petition for reconsideration of that part of our order wherein it was concluded that complainant failed to sustain the burden of proving that the onions contained in cars FGEX 16222 and PFE 43104 met contract specifications.

Complainant alleges that it was error for the presiding officer to exclude testimony concerning sales made by complainant of onions as "Jumbos" on the Chicago and other markets. In a letter addressed to the Department on July 28, 1949, supplementing the petition, complainant's attorney called attention to the decision in *C. & S. Produce Company v. L. N. Coxe*, 8 A. D. 615, decided May 31, 1949, contending that our decision of May 4, 1949, in the present proceeding, insofar as it relates to the action of the presiding officer in refusing to hear the evidence in question, is inconsistent with the *Coxe* decision. We think there is no such inconsistency. The part of the *Coxe* decision referred to involved the size of U. S. No. 1 Bell peppers agreed to be sold. The grade standards provided that U. S. No. 1 sweet peppers should be of a certain diameter unless otherwise specified. Relative to the disputed question of the size of the peppers agreed to be sold, evidence was admitted to show the size of other peppers sold in the seller's district, together with evidence relative to other sales made by the shipper from the same marketing area. In the instant case, testimony was admitted concerning the meaning of the term "Jumbo" in the Stockton, California, area. However, the presiding officer was correct in stating that the probative value of the evidence sought to be introduced by complainant relative to sales at destination and at other markets was very dubious, and in excluding such evidence. We have previously held that where there is a question as to the meaning of descriptive words used in a contract of sale, the interpretation should be governed by the general understanding of the term at shipping point and not where the purchaser is in business. *Thomas Morris Produce Company, Inc. v. Pittsburgh Tomato Company*, S. 123, decided July 22, 1932. See also *Richardson & Co. v. Cornforth*, CCA 7th (1902) 118 F. 325.

Complainant alleges error in our conclusion that the term "Jumbo," as used to describe the size of Yellow Spanish Onions, was understood to mean onions 3 inches in diameter or larger, with some tolerance for undersized onions. We think the evidence clearly establishes that the parties understood the size requirement of the contract to be as we stated it.

In our order of May 4, 1949, it was concluded that the onions delivered in cars FGEX 16222 and PFE 43104 were not "Jumbo" size onions. According to Mr. Covert's own testimony, "Jumbo" onions are required to be mostly 3 inches in diameter or larger. Portions were quoted from the shipping point inspection certificates covering the two shipments in question to show that the onions delivered were "mostly  $2\frac{3}{4}$  to  $3\frac{1}{2}$  [or  $3\frac{3}{4}$ ] inches in diameter."

Counsel for complainant points out that our conclusion that the onions delivered in cars FGEX 16222 and PFE 43104 were not "Jumbo" onions was based entirely on shipping point inspection certificates. Counsel states that our conclusion "completely ignores the appeal inspection at the point of arrival which shows that the onions were from  $2\frac{3}{4}$  inches to  $4\frac{1}{2}$  inches in size with an average of 89 and 90 percent in cars PFE 43104 and FGEX 16222, respectively, over 3 inches in diameter." In this connection it should be noted that copies of the inspection certificates referred to were not attached as exhibits to the pleadings of either party, were not offered in evidence at the hearing, and were not referred to in the briefs of either party. They were, it is true, referred to incidentally in correspondence included in the report of investigation. We take official notice of these inspection certificates, which show that from 2 to 17 percent, average approximately 10 percent, of the onions in car FGEX 16222 were under 3 inches in diameter, and that from 6 to 14 percent, average 11 percent, of the onions in car PFE 43104 were under 3 inches in diameter. These were inspections restricted to the product in the upper two layers and were not, as stated by counsel, appeal inspections. Contrary to complainant's evident contention, these certificates do not help his case. As stated above, the contract was for onions 3 inches in diameter or larger, with some tolerance for undersize onions.

With respect to the question of how wide a deviation from the 3-inch size requirement would have been permissible under the contract in question, there are no U. S. Standards for "Jumbo" Yellow Spanish Onions. Respondent's testimony was to the effect that the applicable tolerance for onions under 3 inches in diameter was 5 percent. Complainant's testimony was to the effect that the tolerance was 5, 10, or 15 percent, depending upon how many odd shaped smaller onions stuck in the 3-inch screen. The U. S. Standards for Bermuda Onions allow a tolerance of 5 percent by weight below the minimum size requirements. The U. S. Standards for Northern Grown U. S. No. 1 Onions also permit a tolerance of 5 percent by weight below the minimum size specifications. It is not necessary for us to decide the exact tolerance for undersize applicable to the contract herein. It is sufficient to say, in view of the tolerance permitted for undersize in other

types of onions and the testimony concerning tolerance introduced at the hearing, that 10 percent would be an unreasonable tolerance to apply to this contract. Accepting 10 and 11 percent, respectively, as the exact percentage of undersize in the two cars, we are forced to the conclusion that the two carloads of onions did not meet contract requirements, and that their rejection by respondent was not without reasonable cause or in violation of the act.

Since we hold that the two carloads of onions did not meet contract requirements as to size, the omission of a finding in our order relative to a market decline between the dates of sale and of rejection of the two shipments in question was not prejudicial to complainant.

The petition for reconsideration should be, and is, hereby dismissed without prior service upon respondent.

The reparation awarded in the order of May 4, 1949, shall be paid within 30 days from the date of this order.

Copies of this order shall be served upon the parties, and this order shall be published.

(No. 2406)

ILLINOIS FRUIT GROWERS EXCHANGE v. RAY ROUSH. PACA Doc. No. 5289. Decided March 28, 1950.

#### **Failure To Pay Purchase Price—Default**

Where complainant alleged that it sold a truckload of peaches to respondent but that respondent failed to pay the purchase price and where respondent failed to file an answer to the complaint, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, and respondent's failure to pay the agreed purchase price is in violation of the act for which reparation should be awarded complainant.\*

*Mr. Frank E. Trobaugh*, of West Frankfort, Illinois, for complainant. *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

#### **PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Informal complaint was received September 9, 1949. A formal complaint was filed January 25, 1950, wherein complainant alleges that it sold a truckload of peaches to respondent for \$410 in August 1949,

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

but that respondent failed to pay the agreed purchase price or any part thereof.

An investigation was made by the Fruit and Vegetable Branch February 2, 1950, and a copy of the report thereof was served on complainant's attorney February 13, 1950. On February 11, 1950, copies of the formal complaint and the report of investigation were served on respondent.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint and a waiver of oral hearing. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

#### FINDINGS OF FACT

1. Complainant, Illinois Fruit Growers Exchange, is a corporation whose address is Carbondale, Illinois.

2. Respondent, Ray Roush, is an individual whose address is Mt. Sterling, Iowa. Respondent was not licensed under the act but was subject to license at the time of the transaction complained of herein. Respondent applied for a license on September 23, 1949, and paid the annual fee for one year plus arrearage for two months. License No. 124170 was issued to respondent on October 3, 1949.

3. On August 4, 1949, at Carbondale, Illinois, contemplating shipment in interstate commerce, complainant sold to respondent, after inspection by respondent, 205 bushels of tree run Elberta peaches for \$410.

4. At the time and place of sale, complainant tendered and respondent accepted delivery of the peaches. Thereafter respondent transported the peaches by truck to some point in the State of Iowa.

5. At the time of sale respondent gave complainant a check for the agreed purchase price of \$410, but later stopped payment on the check. Respondent has not paid complainant the amount of \$410, or any part thereof.

6. Formal complaint was filed January 25, 1950, which was within 9 months after the cause of action accrued.

#### CONCLUSIONS

Failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, as provided in the rules of practice (7 CFR 47.8 (c)).

The facts admitted by respondent's default are that complainant

sold 205 bushels of tree run Elberta peaches to respondent for \$410; that respondent inspected the peaches prior to purchase and accepted delivery of them; and that respondent has failed to pay the agreed purchase price of \$410.

The file contains an affidavit by respondent to the effect that the peaches were not all Elbertas, the kind he agreed to purchase. If this was a purchase after inspection, as alleged in the complaint, respondent saw what he was buying and it would seem immaterial whether all or any of the peaches were Elbertas. If respondent had a valid defense to complainant's claim, he should have stated it in an answer to the complaint.

The respondent's failure to pay the agreed purchase price for the peaches involved is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$410, plus interest, and the facts should be published.

#### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$410, with interest thereon at the rate of 5 percent per annum from September 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2407)

PACA Doc. No. 5247\* Decided March 28, 1950.

#### Dismissal—Settlement Between Parties

Where complainant notified the Department that an amicable settlement of the controversy had been effected and requested dismissal of the complaint, and respondent requested dismissal of its countercomplaint, the complaint and countercomplaint filed in the proceeding are dismissed.

Complaint *pro se*. Mr. Warren S. Earhart, of Kansas City, Missouri, for respondent. Mr. Webster P. Maxson, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

#### ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Formal complaint was filed September 16, 1949, alleging failure of respondent to pay \$1770 due in connection with a carload of peaches sold by complainant to respondent on or about July 15, 1949. On

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\*As explained in Prefatory Note, the identities of the parties are not disclosed.—Ed.

December 22, 1949, respondent filed an answer admitting liability to the extent of \$649.01, but asserting a set off or counterclaim in the amount of \$1120.99, the remainder of the purchase price, which amount it claimed as its damage by reason of complainant's breach of warranties in connection with the shipment. Neither party requested an oral hearing.

It now appears that the parties have reached an agreement as to settlement. By letter dated March 20, 1950, complainant authorized dismissal of the complaint. By letter dated March 3, 1950, respondent authorized dismissal of its countercomplaint. Accordingly, the complaint and countercomplaint filed herein are dismissed.

Copies hereof shall be served upon the parties.

## **COURT DECISIONS**

**CALIFORNIA FRUIT EXCHANGE v. MORRIS HENRY AND ANTHONY SPRACALE, PARTNERS, T/A SPRACALE FRUIT COMPANY. (D. C. U. S. W. D. of Pa.) Decided March 7, 1950.**

### **DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

**Civil Action No. 6866**

#### **Interpretation of Contracts**

Under Pennsylvania Conflict of Laws rule, interpretation of a contract in diversity cases is determined by the law of the place of contracting, but this rule would be subject to the provisions of the Perishable Agricultural Commodities Act where jurisdiction does not arise through diversity.\*

#### **Prima Facie Case Made Out by Findings of Secretary**

A prima facie case made out by the findings of the Secretary of Agriculture must prevail in this court unless overcome by evidence submitted by the parties, notwithstanding the proceeding in this court is not in the nature of an appeal from, or review of determination, but is a proceeding de novo.\*

#### **When Uncontradictory Testimony Raises Question of Fact**

Even if the rule prevails in the Federal courts that a witness's uncontradicted testimony must be accepted as true, where a witness has an interest, the believability of the witness's testimony remains a question of fact for the jury.\*

#### **Buyer Assuming Risk of Normal Deterioration Losses Arising in Transit**

Since title and risk pass to the buyer at the point of shipment under a sale, such as existed in this case, f. o. b. shipping point, if the goods met the contract requirements at the point of shipment, any normal deterioration losses which arose in transit would fall upon the buyer.\*

#### **Proof of Existence of Custom and Usage**

The existence of a usage of custom can only be proved by numerous instances of actual practices, and not by the opinion of a witness.\*

#### **Burden of Proof as to Existence of Custom and Usage**

One who would establish a custom or usage has the burden of proving it by evidence so clear, uncontradictory and distinct as to leave no doubt as to its nature and character.\*

\*Reference to other points involved in this case will be found in *Index-Digest* and *Subject-Index* in this issue of *Agriculture Decisions*.—Ed.



### Measure of Damages Based on Resale of Commodity

In the absence of a market value standard, a vendor of goods which the purchaser declines to accept under his contract is entitled to the difference between the contract price and the amount realized by the vendor through a resale made in good faith with diligent effort.\*

### When Irregularities in Conduct of Juror or Counsel Authorize New Trial

A new trial should not be granted because of irregularities in the conduct of a juror or counsel unless it is made to appear that the alleged misconduct was prejudicial to one of the party litigants.\*

### Jurors Not Concluded by Sealed Verdict

Jurors are not concluded by a sealed verdict, which is only an informal memorandum not a part of a record, and from which any of them have a right to dissent when the verdict is rendered in open court. It is only the oral verdict, when received and recorded by the court, which constitutes a valid and legal verdict.\*

GOURLEY, WALLACE S., *District Judge*:

### OPINION

The proceeding comes before the Court on appeal from the reparation award entered by the Secretary of Agriculture under the Perishable Agricultural Commodities Act. 7 U. S. C. A. Section 499 (g).

We are in reality concerned with two separate causes of action:

(a) California Fruit Exchange against Morris Henry and Anthony Spracale, partners, trading as Spracale Fruit Company, for the amount of \$2,119.40, with interest from October 22, 1946.<sup>1</sup>

(b) Counterclaim of Morris Henry and Anthony Spracale, trading as Spracale Fruit Company, against California Fruit Exchange for the amount of \$1,125.50, with interest from October 22, 1946.<sup>2</sup>

The written contract which gives rise to the causes of action was executed and to be performed in Pennsylvania, and related to Emperor Grapes, U. S. No. 1 Table Grade, Dependable Brand.

Under Pennsylvania Conflict of Laws rule, interpretation of a contract in diversity cases is determined by the law of the place of contracting. *Faron v. Penn Mutual Life Ins. Co.*, 3 Cir., 176 F. 2d 290; Restatement, Conflict of Laws, Section 348; *Levy v. Levy*, 78 Pa. 507; *Newspaper Readers' Service v. Canonsburg Pottery Co.*, 3 Cir., 146 F. 2d 963.

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

<sup>1</sup> California Fruit Exchange will be hereinafter referred to as "California."

<sup>2</sup> Morris Henry and Anthony Spracale, trading as Spracale Fruit Company, will be hereinafter referred to as "Spracale."

Since jurisdiction does not arise through diversity, the rule just expressed would be subject to the provisions of the Perishable Agricultural Commodities Act.<sup>3</sup>

While additional protection and remedies are provided to shippers of perishable commodities under the P. A. C. A., the statute was not intended to repeal the law of sales or to destroy the rights and liabilities of contracting parties thereunder. *LeRoy Dyal Co. v. Allen*, 4 Cir., 161 F. 2d 152; *A. J. Conroy, Inc. v. Weyl-Zuckerman & Co.*, 39 F. Supp. 784.

A verdict was returned in favor of California in the amount of One Dollar and against Spracale.

The matters before the court relate to: —

(a) Motion for arrest of judgment entered in favor of California in the amount of \$1.00, and for judgment notwithstanding the verdict to be entered in favor of California and against Spracale in the amount of \$2,119.40, with interest from October 22, 1946.

(b) Motion for new trial filed on behalf of California.

(c) Motion to set aside verdict or for arrest of judgment in favor of California and against Spracale, and to enter judgment in favor of Spracale.

(d) Motion to set aside verdict or arrest of judgment in favor of California and against Spracale, and to enter judgment on the counterclaim in favor of Spracale and against California in the amount of \$1125.00, with interest from October 21, 1946.

#### STATEMENT OF FACTS

California and Spracale negotiated a sale through the Tri-State Sales Agency at Pittsburgh, Pennsylvania, on October 3, 1946, for two carloads of Emperor Grapes, U. S. No. 1 Table Grade, Dependable Brand, f. o. b. shipping point. One carload was shipped on October 8, 1946, and the other on October 11, 1946. Each of the cars was federally inspected and it was certified that the defects in each instance were average and within the grade tolerance and that decay was generally less than one-half of one percent.

The first car arrived in Pittsburgh on October 17, 1946. Federal inspection was restricted to the top layer, and it was found, as to decay, that from the samples inspected the average of  $\frac{1}{2}$  of 1% to 5%, many none, average 1% gray mold rot, generally nesting. The second car arrived in Pittsburgh on October 22, 1946. Federal inspection and findings were in substance similar to the inspection of the first car.

<sup>3</sup> Perishable Agricultural Commodities Act will be hereinafter referred to as "P. A. C. A."

Both cars of grapes were rejected by Spracale. The first car was reconsigned to Philadelphia, Pennsylvania, and the second car to New York. The grapes were sold and California's claim is based on the loss sustained.

California contends:

- (1) That the grapes complied with the contract.
- (2) That the refusal to accept by Spracale was without cause or justification.
- (3) That after the grapes were rejected, they were sold to the best advantage.
- (4) That markets were selected where the best prospects and prices prevailed.
- (5) That California minimized the loss through the extension of most reasonable effort.

Spracale contends:

- (1) That California failed and neglected to ship the type and quality of merchandise as provided by the terms of the contract.
- (2) That the condition which existed did not arise through transportation and that the grapes had a latent defect.
- (3) That the grapes when delivered to Pittsburgh, Pennsylvania, contained a gray mold rot condition which was of field origin.
- (4) That such condition of the grapes constituted a failure to deal in accordance with the terms of the contract, and Spracale is not liable for any loss sustained by California.
- (5) That Spracale is entitled to recover for the loss which it had suffered under the contract as a result of the failure of California to comply with the terms thereof.

#### LEGAL PRINCIPLES INVOLVED

The purpose of the P. A. C. A. was primarily to eliminate unfair practices in the marketing of perishable agricultural commodities in interstate commerce in the case of a declining market by making it difficult for unscrupulous persons to take advantage of shippers by wrongful rejection of the goods upon arrival at a point where it is expensive and impractical for the shipper to enforce his legal rights. To effectuate this purpose, Congress did not go so far as to make rejection by buyers unlawful altogether. Instead, it made rejection of shipments of perishable agricultural commodities by buyers unlawful "without reasonable cause." *LeRoy Dyal Co. v. Allen*, supra; *Martinelli & Co. v. Simon Siegel Co.*, 1 Cir., 176 F. 2d 98.

A prima facie case made out by the findings of the Secretary of Agriculture must prevail in this court unless overcome by evidence submitted by Spracale, notwithstanding the proceeding in this court

is not in the nature of an appeal from, or review of determination, but is a proceeding de novo. *Barker Miller Distributing Co. v. Berman*, 8 F. Supp. 60; *Alexander Marketing Co. v. Harrisburg Daily Market*, 87 F. Supp. 124.

The Secretary of Agriculture may make such rules and regulations as may be necessary to carry out the provisions of the Act. 7 U. S. C. A. Section 499 (o).

7 C. F. R. 46.24 (i) of the Regulations promulgated by the Secretary of Agriculture provides as follows:

"F. O. B. \* \* \* means that the produce quoted or sold is to be placed free on board the boat, car, or other agency of the through land transportation at shipping point, in suitable shipping condition \* \* \* and that the buyer assumes all risk of damage and delay in transit not caused by the shipper, irrespective of how the shipment is billed. The buyer shall have the right of inspection at destination before the goods are paid for, but only for the purpose of determining that the produce shipped complied with the terms of the contract or order at time of shipment, subject to the provisions covering suitable shipping condition. Such right of inspection shall not convey or imply any right of rejection by the buyer because of any loss, damage, deterioration, or change which has occurred in transit."

The Regulations further provide that "suitable shipping condition" means that the commodity, at the time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the destination specified in the contract of sale. 7 C. F. R. 46.24 (j); *Alexander Marketing Co. v. Harrisburg Daily Market*, supra.

A motion for a directed verdict or judgment notwithstanding the verdict under the Federal Rules raises a question of law only; that is whether there is any evidence which, if believed, would authorize a verdict against the defendant and the trial court in considering such motion does not exercise any discretion but makes only a ruling of law. *Marsh v. Illinois Central R. Co.*, 5 Cir., 175 F. 2d 498; *Grayson v. Deal et al.*, 85 F. Supp. 431.

In passing upon a motion to set aside a verdict for plaintiff and to enter judgment for the defendant, evidence including all reasonable inferences to be drawn therefrom must be taken in the light most favorable to the plaintiff and all conflicts must be resolved in his favor. *Waggaman v. General Finance Co. of Philadelphia, Pa., Inc.*, 3 Cir., 116 F. 2d 254; *Schad et al. v. Twentieth-Century Fox Film Corp., et al.*, 3 Cir., 136 F. 2d 991; *Lukon v. Penna. R. Co.*, 3 Cir. 131 F. 2d 327; *Meonberg v. Penna. R. Co.*, 3 Cir., 165 F. 2d 50; *Kraus v. Reading Co.*, 3 Cir., 167 F. 2d 313; *O'Brien v. Public Service Taxi Co.*, 3 Cir., 178 F. 2d 211; *Fore v. Southern Ry. Co.*, 4 Cir., 178 F. 2d 349.

Upon a motion for a directed verdict, the evidence must be viewed in

the light most favorable to the party against whom the verdict would be directed, and all conflicts must be resolved in his favor. *Reno Sales Co., Inc. v. Pritchard Industries, Inc.*, 7 Cir., 178 F. 2d 279; *Aetna Casualty & Surety Co. v. Yeatts*, 4 Cir., 122 F. 2d 350.

The court cannot concern itself with the credibility of the witnesses or the weight of the evidence. *Roth v. Swanson*, 8 Cir., 145 F. 2d 262.

The court is not free to reweigh the evidence and set aside the jury's verdict merely because the jury could have drawn different inferences or conclusions, or because the court regards another result as more reasonable. *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29.

Where uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury. *Gunning v. Cooley*, 281 U. S. 90, 94.

## DISCUSSION

As to the efforts extended by California to dispose of the grapes after rejection by Spracale, it is contended that the evidence presented by California is uncontradicted and unimpeached by anything appearing in the record, and is not inherently improbable. That the Court was obliged to accept it as true and charge the jury that no evidence existed in the record to disprove that the claimant did not secure the highest available price for the merchandise after its rejection by Spracale.

The testimony introduced by California was by way of deposition. Said witness was interested since he had been employed by California as their auctioneer and price sales manager for a number of years. Even if the rule prevails in the federal courts that a witness's uncontradicted testimony must be accepted as true, where a witness has an interest, the believability of the witness's testimony remains a question of fact for the jury. *Broadcast Music v. Havana Madrid Restaurant Corp.*, 2 Cir., 175 F. 2d 77; 8 A. L. R. 796, *et seq.*

The Court could not, therefore, instruct the jury, as a matter of law, to return a verdict in favor of California and against Spracale for the amount of said claim.

Section 2 of the P. A. C. A., 7 U. S. C. A. Section 499 (b) (2) reads in part as follows:

"It shall be unlawful \* \* \* in any transaction in interstate commerce for any dealer to fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodities sold in interstate commerce by such dealer."

Where food products do not meet the contract requirements, the shipper must bear the loss resulting from deterioration in transit and

the fact that the defect in the commodity is not discernible at the point of shipment does not alter the liability which falls upon the shipper by reason of the implied warranty which is attached to the goods. However, since title and risk pass to the buyer at the point of shipment under a sale, such as existed in this case, f. o. b. shipping point, if the goods met the contract requirements at the point of shipment, any normal deterioration losses which arose in transit would fall upon the buyer. *A. J. Conroy, Inc. v. Weyl-Zuckerman & Co.*, supra; *Steel City Fruit Co. v. Monheim's Wholesale Produce Co.*, 64 F. Supp. 275.

Both parties offered to establish the custom in the trade to dispose of deciduous fruits when rejected under the circumstances which existed.

The existence of a usage or custom can only be proved by numerous instances of actual practices, and not by the opinion of a witness. *Aurand v. Universal Carloading and Distributing Co.*, 131 Pa. Sup. 502; *Wilson Drilling Co. v. Faust*, 60 F. Supp. 373.

One who would establish a custom or usage has the burden of proving it by evidence so clear, uncontradictory and distinct as to leave no doubt as to its nature and character. *Doyle v. Atlantic Refining Co.*, 357 Pa. 92; *Everly v. Shannopin Coal Co.*, 139 Pa. Sup. 165.

A practice to arise to the dignity of a custom so as to enter into and form a part of a contract must possess those elements of certainty, generality, fixedness and uniformity as are recognized by the law as essential to constitute a custom. A loose variable custom or discretionary practice does not arise to the dignity of a custom so as to control the rights of the parties to a contract. *Doyle v. Atlantic Refining Co.*, supra; *Makransky v. Weston*, 304 Pa. 383; *Tate-Jones & Co., Inc. v. Union E. S. Co.*, 281 Pa. 448; *Everly v. Shannopin Coal Co.*, supra; *Etna Forge and Bolt Co. v. Youngstown Sheet & Tube Co.*, 3 Cir., 282 F. 786.

Further a loose and variable practice will not be allowed to control the rights of the parties, nor will an alleged usage which leaves some material element to the discretion of the individual. *Sickelco v. Union Pac. R. Co. et al.*, 9 Cir., 111 F.2d 746.

On the basis of said rule, no custom was established by either party as to the practice which was followed where a car of deciduous fruit is rejected in the Pittsburgh market.

Where the purchaser of goods refuses to accept them, the seller has a reasonable time to dispose of them in the nearest available market. *Huessener v. Fiskel & Marks Co.*, 281 Pa. 535; *Rees v. Bowers Co.*, 280 Pa. 474.

In the absence of a market value standard, a vendor of goods which the purchaser declines to accept under his contract is entitled to the difference between the contract price and the amount realized by the vendor through a resale made in good faith with diligent effort. *U. S. v. Swift & Co.*, 270 U. S. 124.

As to the motions of California and Spracale for the entry of judgment in their favor, the facts and all reasonable inferences must be considered in the light of the P. A. C. A. and the law of sales.

I believe the question raised by each of the parties in their motions for the entry of judgment notwithstanding the verdict resolved itself into a question of fact for the determination of the jury.

The motion of California for arrest of judgment and the entry of judgment notwithstanding the verdict in favor of California and against Spracale in the amount of \$2119.40, with interest from October 22, 1946, is refused.

The motion of Spracale for arrest of judgment and the entry of judgment notwithstanding the verdict in favor of Spracale is refused.

The motion of Spracale on the counterclaim for arrest of judgment and to enter judgment notwithstanding the verdict in favor of Spracale and against California in the amount of \$1125.00, with interest from October 21, 1946, is refused.

As to the motion for new trial filed by California, there is only one question which requires or justifies discussion.

The jury agreed to a sealed verdict and separated. After the sealed verdict had been agreed upon and the jurors were departing, counsel for Spracale learned through inquiry made of one of three jurors as to the verdict which had been reached. Counsel communicated the information that he had secured to his client, and the information came to the attention of counsel for California. The matter was called to the attention of the court by counsel for California prior to the return of the verdict in open court the following morning, and as a result thereof the Court interrogated each of the jurors and counsel for Spracale as to what had transpired.

A juror may be interrogated as to acts or declarations outside of the jury room where evidence of such acts has been given as ground for a new trial. *Liggett & Myers Tobacco Co. v. Imbraguglia*, 73 F. Supp. 909.

Counsel for Spracale stated that while waiting for an elevator, and out of curiosity inquiry was made of one of the women on the jury as to the verdict which had been reached. He stated that the conversation occurred with one of three women who he could not identify and that the inquiry which he made was, "What did you do in the case?" One of the women answered and said that they had found the verdict

for California for \$1.00. Counsel said that he believed that the woman had answered his question in jest and that he remarked to her, "Oh, you are just kidding me" and no further question was had relative to the verdict. Only one juror admitted any conversation with counsel for defendant. Her explanation was that Spracale's counsel made inquiry, "Did you come to a verdict?" And the juror's answer was, "I quit." After all of the jurors were interrogated by the court, the verdict was opened and announced in open court.

In the interests of proper and impartial administration of justice, thorough consideration should be given the actions of counsel for Spracale.

The practice of allowing the jury to seal a verdict and then separate is very general throughout the United States. All of the authorities agree that the only verdict is that which the jury announces orally in court, and which alone is received and recorded as the jury's finding. *Kramer v. Kister*, 187 Pa. 227.

A sealed verdict is a mere agreement reached by jurors and does not become general until it is read into the record and the jurors are discharged by the court.

Jurors are not concluded by a sealed verdict, which is only an informal memorandum not a part of a record, and from which any of them have a right to dissent when the verdict is rendered in open court. It is only the oral verdict, when received and recorded by the court, which constitutes a valid and legal verdict. *Havranek v. Pittsburgh et al.*, 344 Pa. 375, 378.

A jury can be polled after a sealed verdict is returned in open court. *Kramer v. Kister*, supra.

No request was made by either party for leave to poll the jury.

It must be remembered that an attorney is an officer of the court.

If an officer of the court, whether or not he has charge of the jury, makes statements to a jury during their deliberation which are calculated to influence their verdict, it is ground for a new trial. *Clyde Mattox v. U. S.*, 146 U. S. 140.

It is the duty of jurors and counsel representing a party litigant to keep themselves removed from all influences which can cast a suspicion upon the integrity of a jury's verdict. However, the court should not be swift to grant a new trial on account of irregularities not attended with any intentional wrong where it is made satisfactorily to appear that the party complaining has not and could not have sustained any injury by the actions committed. 64 C. J. Section 803, page 1018.

It is gross misbehavior for any person to speak to a juror or for a juror to permit conversation concerning the cause, after he is sum-



moned and before the verdict. It would be an injury to the administration of justice not to declare that it is gross misbehavior for a person to speak to a juror or for a juror to permit any person to converse with him respecting the cause which he is trying at any time after he is summoned and before the verdict is delivered. *Baline's, Lessee v. Chambers*, 1 S. & R. 169.

The courts look with suspicion upon any communications between parties to a suit or their counsel and the jury impaneled to try it; and if such communication is had and it appears that a conversation was had about the suit, or the communication is not explained satisfactorily, it will, in itself, be ground for a new trial. If, when explained, however, it can be seen that in the communication nothing was said about the case and nothing was done for the purpose of influencing the mind of the jury, and that the communication or conversation had no influence on the verdict which was reached, no ground exists to set the verdict aside for the reason that said comment could not have been prejudicial.

The trial of the proceeding was greatly prolonged in view of the issues which existed in the case. It was conducted on both sides by very capable, alert and learned counsel, with numerous and many objections, and in some respects became a fascinating contest of wits between counsel. At times the personalities of counsel were allowed to interfere with their sound clear judgment. Members of the bar have great liberty and high privileges in the assertion of their client's rights, but on the other hand they have equal obligations as officers of the court in the administration of justice to maintain and keep their professional conduct free from suspicion or criticism.

If the verdict reached by the jury was in any other way than by a conscientious observance of the oath which every juror took, it would be the duty of the court to grant a new trial. *United States v. Brandenburg*, 3 Cir., 162 F. 2d 980, 983.

The authorities on the question are somewhat limited. A new trial should not be granted because of irregularities in the conduct of a juror or counsel unless it is made to appear that the alleged misconduct was prejudicial to one of the party litigants. *Liggett & Myers Tobacco Co. v. Imbruglia*, supra; *Alexander v. The Commonwealth*, 105 Pa. 1; *Commonwealth v. Manfred*, 162 Pa. 144; *McCoy v. Shoemaker*, 24 York Leg. Rec. 165; *Weist v. Luyendyr*, 73 Mich. 661, 665, 41 N. W. 839; *Zageir v. Southern Express Co.*, 171 N. C. 692, 89 S. E. 43; *Tillett v. Norfolk Southern R.R. Co.*, 166 N. C. 515, 520, 82 S. E. 866.

No inferences should be drawn from what has been stated that the court is condoning the improper conduct which occurred.

Any departure from the rule that "after a jury has retired, nothing

further should reach it in any form whatsoever unless by order of the court in strict conformity with established jury procedure" has a tendency to lessen respect for the administration of justice and the dignity that should surround jury trials.

However, assuming that such may have been the effect of the transgression complained of, and however much such possible effect is to be deplored, it is not to be confused with the question I am called upon to determine.

Was the transgression of such a character as likely to be prejudicial to the opposing party litigant?

No basis exists for determining that it was. The action of counsel for the defendant was irregular, uncalled for and severely criticized. It is hoped that such an occurrence will never again be permitted to arise in this court. If any possible prejudice could have arisen to the opposing litigant, a new trial would be granted and appropriate disciplinary action taken against the offender.

Spracale was in no respect shown to have participated in said act or to have planned, suggested, prompted or approved the act. The verdict had been agreed upon, signed and sealed, to be delivered to the court the next morning. The verdict slip was in the possession of the foreman of the jury who was not involved in the conversation with Spracale's counsel. It is not claimed that any change was made in the verdict and no benefit could have been derived by Spracale.

In view of the fact that the jury had reached a sealed verdict at the time the conversation occurred between defendant's counsel and one of the jurors, it would not have been possible for the conversation which took place to affect the mind of one or more of the jurors.

I find nothing which would lead to the belief that the verdict was reached in any way other than by a conscientious observance by the jurors of the oath which was taken, and in view thereof I do not believe that grounds exist for awarding a new trial. *U. S. v. Brandenburg*, supra.

A motion to grant a new trial is governed by Rule 59 of the Federal Rules of Civil Procedure and is not subject in any way to rules of state practice. *Aetna Casualty and Surety Co. v. Yeatts*, 4 Cir., 122 F. 2d 350.

As to all other questions raised, it is the duty of the court to grant a new trial only if the court is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false or will result in a miscarriage of justice. With this standard in mind, I have given careful attention to the problem. Suffice to say, it does not appear to me a new trial is justified. The weight to be given the testimony, the inferences and deductions to be drawn therefrom, was for the jury to appraise and to accredit or reject.

Further, I find no error in the rulings on the admissibility of evidence or the general charge of the court.

As to the refusal of the court to submit requested instructions, the points of law contained therein were covered in the general charge of the court. Such refusal does not constitute prejudicial error. *Chicago & N. W. Ry. Co. v. Carl*, 8 Cir., 178 F. 2d 497.

The motion of California for a new trial is refused.

An appropriate order will be filed.

### ORDER

And now, this 7th day of March 1950, it is ordered:

(a) That motion for arrest of judgment entered in favor of California Fruit Exchange and against Morris Henry and Anthony Spracale, trading as Spracale Fruit Company, in the amount of One Dollar, and for the entry of judgment notwithstanding the verdict to be entered in favor of California Fruit Exchange and against Morris Henry and Anthony Spracale, trading as Spracale Fruit Company, in the amount of \$2119.40, with interest from October 22, 1946, is refused.

(b) That motion to set aside verdict or for arrest of judgment in favor of California Fruit Exchange and against Morris Henry and Anthony Spracale, trading as Spracale Fruit Company, in the amount of One Dollar, and to enter judgment on the verdict in favor of Morris Henry and Anthony Spracale, trading as Spracale Fruit Company, is refused.

(c) That motion to set aside the verdict or arrest of judgment in favor of California Fruit Exchange and against Morris Henry and Anthony Spracale, trading as Spracale Fruit Company, in the amount of One Dollar and to enter judgment notwithstanding the verdict, on the counterclaim, in favor of Morris Henry and Anthony Spracale, trading as Spracale Fruit Company, and against California Fruit Exchange in the amount of \$1,125.00, with interest from October 21, 1946, is refused.

(d) Motion of California Fruit Exchange for a new trial is refused.

(e) Judgment is hereby entered on the verdict in favor of California Fruit Exchange and against Morris Henry and Anthony Spracale, trading as Spracale Fruit Company, in the amount of One Dollar together with the costs.

(f) Judgment on the counterclaim of Morris Henry and Anthony Spracale, trading as Spracale Fruit Company, against the California Fruit Exchange is entered in favor of California Fruit Exchange.

# INDEX-DIGEST AND SUBJECT-INDEX OF AGRICULTURE DECISIONS

MARCH 1950

## AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

### COURT DECISIONS FOLLOWED

	No.	Page
Titusville Dairy Products Company <i>v.</i> Charles F. Brannan, 176 F. 2d 332 (C. C. A. 3rd 1949), <i>cert. denied</i> , 338 U. S. 905..	2366	292

### ORDER NO. 41 (CHICAGO, ILLINOIS)

#### HANDLER

Plant Selling Only Certified Milk Properly Classified as Where petitioners complained that they have been errone- ously considered as a handler subject to Order No. 41, as amended, issued under the act and regulating the han- dling of milk in Chicago, on the ground that a plant which sold only the "certified" portion of its milk re- ceipts in the city of Chicago could not be classified as a handler under the Chicago Order, the Judicial Officer held, that all milk at petitioners' plant was subject to the order, that it did not depend upon the quantity of milk shipped to the marketing area so long as all the milk, both certified and uncertified was approved by Chicago health authorities for distribution in the area, and that in view of the foregoing, the relief sought by petitioners should be denied and the petition dismissed.....	2366	291
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#### HARDSHIP No EXCUSE FOR AVOIDING OBLIGATIONS UNDER

Petitioners' contention that they cannot afford to handle their certified milk in a separate plant from the plant at which they handle both the certified and non-certified milk is untenable since an otherwise reasonable regula- tion covering a number of persons does not become in- valid as to one of these persons simply because of the peculiar or unique situation of that person making it difficult for that person to conduct business operations in the usual way in which the person would like to oper- ate, and because the law does not require that a general pricing regulation provide a profit for all persons subject to it.....	2366	291
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#### INTERSTATE COMMERCE

##### "De Minimis" Principle

The "de minimis" principle invoked by petitioners has found little favor with the courts in recent cases where handlers have attacked orders under the act on the ground that there was only a small percentage of the handling of milk in a marketing area actually "in the current" of interstate commerce.....	2366	291
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**AGRICULTURAL MARKETING AGREEMENT ACT OF 1937—Continued****ORDER NO. 41 (CHICAGO, ILLINOIS)—Continued**

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**MERE PLANT APPROVAL BY HEALTH AUTHORITY SUFFICIENT  
TO SUBJECT PLANT TO FEDERAL REGULATION UNDER ACT**

All milk received at a plant approved by health authorities for the marketing area although milk was sold locally where the plant is situated and did not move in interstate commerce, held, subject to Federal regulation under the act.....

2366 292

**PACKERS AND STOCKYARDS ACT, 1921****CEASE AND DESIST**

Violations of act.....

2369 305

2370: 307; 2371: 309; 2372: 311; 2373: 312; 2374: 314;  
2375: 316; 2376: 318; 2377: 320; 2378: 322; 2379: 324;  
2380: 326; 2381: 328; 2382: 331; 2383: 333; 2384: 335;  
2385: 338; 2386: 340.

**RATES AND CHARGES****CONTINUATION OF**

Respondents' petitions requesting that the current authorization be continued in effect to and including March 14, 1951, and that they be authorized to establish maximum buying charges on other than rail shipments on the basis of a carload equivalent of 26,000 pounds, granted.....

2367 301

**MODIFICATION OF**

Inasmuch as the parties are agreed with respect to the rates petitioned for and no objection has been filed the petition is granted subject to the terms of the informal agreement between the parties set out in the answer filed on March 6, 1950, and, for good cause shown, this order shall become effective in less than 30 days.....

2368 302

**REGISTRATION****SUSPENSION OF**

Inasmuch as respondent admitted the allegations that he wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the Packers and Stockyards Act and wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the Federal Trade Commission Act by paying employed weighmasters at the stockyards for favorable but false weights on cattle bought and sold by respondent, the respondent's registration is suspended for a period of six months in view of the mitigating circumstances, and he is ordered to cease and desist from committing the violations of the act and the regulations issued thereunder.....

2369 304

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**PACKERS AND STOCKYARDS ACT, 1921—Continued****REGISTRATION—Continued****SUSPENSION—Continued**

Inasmuch as respondent admitted the allegations that he wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the Packers and Stockyards Act, and wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the Federal Trade Commission Act by paying employed weighmasters at the stockyards for favorable but false weights on cattle bought and sold by respondent, the respondent's registration is suspended for a period of ten months, and he is ordered to cease and desist from commission of the violations of the act and the regulations issued thereunder-----

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2370 306

2371:308; 2372:310; 2373:311; 2374:313; 2375:315;  
2376:317; 2377:319; 2378:321; 2379:322.

Inasmuch as respondent admitted the allegations that he wilfully engaged in unfair and deceptive practices in violation of section 312 (a) of the Packers and Stockyards Act, wilfully caused false entries to be made in the records of the operator of the Kansas City Stock Yards in violation of section 10 of the Federal Trade Commission Act in connection with the paying of employed weighmasters at the stockyards for favorable but false weights on cattle bought and sold by respondent, and wilfully gave false information to representatives of the Secretary of Agriculture concerning his dealer operations at the stockyards in violation of section 201.88 of the regulations issued under the Packers and Stockyards Act, the respondent's registration is suspended for a period of one year and he is ordered to cease and desist from committing the violations of the act and the regulations issued thereunder-----

2380 324

2381:327; 2382:329; 2383:332; 2384:334; 2385:336;  
2386:339.

**SUSPENSION OF REGISTRATION****Violations of act-----**

2369 305

2370:307; 2371:309; 2372:311; 2373:312; 2374:314;  
2375:316; 2376:318; 2377:320; 2378:322; 2379:324;  
2380:326; 2381:328; 2382:331; 2383:333; 2384:335;  
2385:336; 2386:340.

**VIOLATION OF ACT****Causing false entries to be made in records of operator of stockyards-----**

2369 305

2370:307; 2371:309; 2372:311; 2373:312; 2374:314;  
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Where a buyer unloaded two truckloads of bananas de- livered to him by the seller, and distributed the bananas to dealers, such action constitutes acceptance under the contract.....	2392	364
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Where a purchaser accepted and unloaded three shipments of spinach prior to giving notice to the shipper of alleged defects, held, such action constitutes acceptance and the purchaser is liable for the entire purchase price in the absence of proof of damages resulting from a breach of warranty by the shipper.....	2388	349
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TERMS OF**

Where respondent-buyers employed complainant-seller to guard the fields of watermelons purchased by the former from the latter until harvesting time, paying complainant a weekly wage for these services, and the record shows that complainant adopted reasonable pre- caution in guarding the melons, and there is no evidence that complainant unlawfully took any of the melons and the evidence is insufficient to establish that complainant was negligent in failing to prevent removal by others, it is held, that the mere fact that some of the melons were unlawfully taken from the fields, if they were so taken, does not establish that complainant took them or negligently allowed them to be taken, that as watch- man complainant was not a guarantor against theft, and that respondent's failure to take delivery of the watermelons under the contract is a violation of the act..	2395	374
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## DISMISSAL

## BREACH OF CONTRACT

Since the U. S. Standards for watermelons provide that melons in any lot averaging less than 30 pounds shall not vary more than 4 pounds below the stated average, and not more than 5% of the melons in any lot may be below the minimum size requirements, it is held, that contract for sale of a carload of watermelons averaging 29 pounds was breached by a tender of a carload of watermelons of which 15% were under 23 pounds.....	2389	355
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**PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Continued****DISMISSAL—Continued**

No. Page

**FAILURE TO MITIGATE DAMAGES**

Where it is shown by shipping point inspection certificates covering certain f. o. b. shipments of onions that the onions met contract requirements as to grade, it is held, that respondent-buyer's rejection of the onions was without reasonable cause and in violation of the act but since complainant failed in his duty to take reasonable steps to mitigate the damages following the buyer's rejection of the onions, which were subsequently abandoned to the railroad by complainant's broker, and there is no evidence to show that the action of the broker in abandoning the onions to the carrier was reasonable in the circumstances, it is held, that there is no basis for an award of reparation to complainant in connection with the onions in question.....

2387 341

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2405 403

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2391 361

**SETTLEMENT BETWEEN PARTIES**

Where complainant notified the Department that an amicable settlement of the controversy had been effected and requested dismissal of the complaint, and respondent requested dismissal of its countercomplaint, the complaint and countercomplaint filed in the proceeding are dismissed.....

2407 405

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2387 342

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Where respondent S denied entering into a contract with complainant for the purchase of onions and contended that his agreement was with respondent L, but the weight of the evidence shows that L acted as a broker in finding a buyer for complainant, it is held, that respondents made a valid legal contract with complainant for the purchase of seven carloads of onions.....

2387 342

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## PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Continued

## EVIDENCE—Continued

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## FAILURE TO SHOW BREACH OF CONTRACT REQUIREMENTS

Where buyer alleged that two carloads of bananas failed to ripen properly, which statements were not supported by documentary or other evidence as to the nature or extent of the alleged unsatisfactory condition, held, that the buyer failed to show by a preponderance of the evidence that the bananas did not meet contract requirements.....

2392 363

## FAILURE TO SHOW BREACH OF GUARANTY

Where complainant-seller sold his entire crop of watermelons to respondent-buyers who took delivery of only one truckload of melons, and thereafter refused to go on with the contract or to pay complainant the balance of the purchase price on the ground that complainant failed to comply with two conditions of the contract, viz., that there would be enough ripe watermelons to load on a certain date, and that complainant would guard the fields and make sure no watermelons were taken, it is held, in an action by complainant for damages, that respondents did not rely upon the statement, if any, made by complainant, since it is clear from the record that the purchaser's agent relied upon his own years of experience in the business as to probable harvesting time and further, that the contract with complainant to guard the watermelons was a separate contract from the contract of purchase and sale, and respondents had no right to refuse to go on with the contract.....

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2405 403

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## FAILURE TO SHOW EXISTENCE OF

Where complainant-seller contended that the contract for the purchase and sale of certain onions was on an f. o. b. acceptance final basis and called for 85 percent U. S. No. 1 or better onions, which was denied by respondent-buyer who promptly objected to the phrase "acceptance final" in the broker's confirming telegram, and the record contains no further supporting evidence of complainant's contention that the contract was on an acceptance final basis, it is held, that to establish an acceptance final contract the evidence must be clear and convincing on that point, the contract is assumed to be on an f. o. b. shipping point basis, and it is further held that the evidence is sufficient to establish that the contract was for 85 percent U. S. No. 1 or better onions, rather than for U. S. No. 1 medium size, as contended by respondent-buyer.....

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## PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Continued

## REPARATION—Continued

## FAILURE TO PAY BALANCE OF PURCHASE PRICE—Continued

Where complainant alleged that it sold a carload of tomatoes to respondent and respondent failed to pay the full purchase price, and where respondent failed to file an answer, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, and respondent's failure to pay the balance of the purchase price is in violation of the act for which complainant is entitled to an award of reparation in the amount of the purchase price..... 2403 396

Where complaint alleged that respondent failed to pay complainant the balance of the purchase price for potatoes sold to respondent, and where respondent did not file an answer, held, respondent's failure to file an answer constitutes an admission of the allegations in the complaint, and a waiver of oral hearing, and complainant is entitled to an award of reparation in the amount set forth in the complaint..... 2404 398

Where respondent purchased and accepted delivery of a truckload of bananas but failed to pay the full contract purchase price, and respondent's only complaint which concerned the size of the bananas was not made until more than four months after purchase, it is held, that complainant is entitled to recover damages in the amount of the unpaid balance of the agreed purchase price..... 2393 367

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Where a buying agent bought watermelons in his own name, but failed to disclose to the seller his agency or the name of his principal, and paid a deposit at the time the contract was entered into, and the principal failed to take delivery of a major portion of the melons under the contract, it is held, in an action by the seller against the principal and the agent, that both are liable for the seller's damages, and that the seller is entitled to an award of reparation against both the principal and the agent, although a full recovery from one will bar any recovery from the other..... 2395 373

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## REPARATION—Continued

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Where complainant alleged that he sold a carload of potatoes to respondent, but respondent failed to pay the purchase price, and where respondent failed to answer the complaint, held, failure to answer the complaint constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, and complainant should be awarded reparation in the amount of the purchase price.....	2390	359
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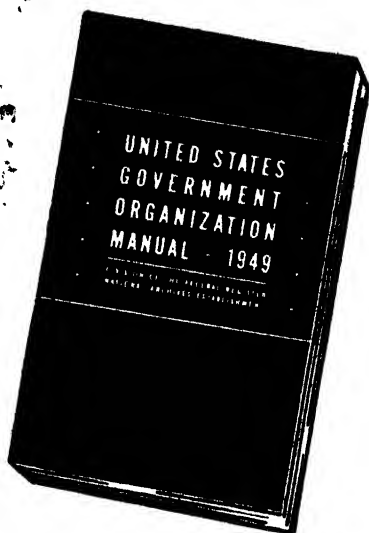
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**MANUFACTURER—PRODUCER—BANKER—LAWYER  
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**UNITED STATES DEPARTMENT OF AGRICULTURE**

# **AGRICULTURE DECISIONS**

**DECISIONS OF THE SECRETARY OF AGRICULTURE**

**UNDER THE  
REGULATORY LAWS ADMINISTERED IN THE  
UNITED STATES DEPARTMENT OF AGRICULTURE**

**(Including Court Decisions)**



**VOL. 9, No. 4  
(Nos. 2408-2432)  
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**By**

**I. J. LOWE**

**Attorney and Editor, Office of the Solicitor**

## PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered in the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial (as contrasted with quasi-legislative) character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for hearing have been given. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register. For reasons of policy, the identities of the parties are not reported in decisions issued under one statute which expressly authorizes, but does not require the publication of the facts and circumstances of a violation, unless the Secretary in his decision has specifically ordered or directed such publication.

The principal statutes concerned are the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 1946 ed. 601 *et seq.*), the Commodity Exchange Act (7 U. S. C. 1946 ed. 1 *et seq.*), the Grain Standards Act (7 U. S. C. 1946 ed. 71 *et seq.*), the Packers and Stockyards Act, 1921 (7 U. S. C. 1946 ed. 181 *et seq.*), and the Perishable Agricultural Commodities Act, 1930 (7 U. S. C. 1946 ed. 499a *et seq.*).

The decisions published are numbered serially, in the order in which they appear herein, as "Agriculture Decisions". They may be cited by giving the volume and page, for illustration, thus: 1 A. D. 472. It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D-578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in the Agriculture Decisions.

Current court decisions involving the regulatory laws administered by the Department will be published herein.

An Index-Digest and Subject-Index of the decisions reported and the court cases published herein will be found at end of each monthly issue, and the cumulative yearly Index-Digest and Subject-Index, lists of decisions reported, statutes, orders, etc., construed, and statistical and other tables will be found at the end of No. 12 (December) issue of the Agriculture Decisions.

Copies of monthly issues beginning with January 1942 of the decisions will be available through the Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C.

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**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**  
**AGRICULTURE DECISIONS**

(No. 2408)

*In re* POTSDAM CREAMERY, INC. AMA Doc. No. 27-81. Decided  
April 25, 1950.

**Order No. 27—Reclassification of Milk “Not in Accordance with Law”—Relief  
Requested by Petitioner Granted**

Where market administrator under Order No. 27 reclassified to Class I-A certain quantities of milk originally reported by petitioner in Class IV-B as Cheddar cheese and it appeared that a fire destroyed or damaged the plant and the cheese manufactured therein was damaged and disposed of in other than usual commercial channels and the handler was apparently unaware until after reclassification of the milk involved from Class IV-B to Class I-A that failure to record the disposition of the damaged cheese would result in the reclassification of the milk into Class I-A, it is held, in view of all the circumstances involved, that the reclassification was “not in accordance with law” and, therefore, petitioner’s request for relief should be granted.\*

*Messrs. Harry L. Marcus and Herbert L. Maltinsky*, Brooklyn, New York, for petitioner. *Messrs. John G. Liebert and Julius C. Krause* for Production and Marketing Administration. *Mr. Jack W. Bain*, Hearing Examiner.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a proceeding under Section 8c (15) (A) of the Agricultural Adjustment Act (1933), as amended, and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 601 *et seq.*), instituted by a petition filed by Potsdam Creamery, Inc., a handler subject to Order No. 27 (7 CFR and Supps., Part 927), which regulates the handling of milk in the New York metropolitan milk marketing area. The petition was filed on July 31, 1946, and protests as illegal the action of the market administrator in reclassifying to Class I certain quantities of milk originally reported by the peti-

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

tioner in Class IV-B as Cheddar cheese. Under the practice then in existence, no answer to the petition was filed. However, the Acting Assistant Administrator of Production and Marketing Administration determined that the petition stated a sufficient cause of action for hearing and the Solicitor of the Department approved the determination.

Following the disposition of certain preliminary procedural matters, a hearing upon the petition was held at New York, New York, on January 12 and 13, 1948, before Jack W. Bain, Office of Hearing Examiners, as presiding officer. Harry L. Marcus, by Herbert L. Maltinsky, Brooklyn, New York, appeared for the petitioner, and J. C. Krause and J. G. Liebert, Office of the Solicitor, United States Department of Agriculture, appeared for the respondent. At the hearing, the petitioner produced testimony and exhibits to support its contentions that, in April 1945, certain quantities of milk were shipped from its receiving plant and delivered at a cheese manufacturing plant for the account of the purchaser, that the milk was there made into Cheddar cheese, that the plant was destroyed by fire, that some of the cheese was shipped out in usual commercial channels and that the remainder, damaged by fire and condemned for human consumption, was disposed of for other uses. The petitioner's position is that, under the circumstances shown, the records and reports made available to the market administrator were sufficient to support the claimed IV-B classification for the milk equivalent of the cheese manufactured but not disposed of in the usual commercial channels as cheese for human consumption. Testimony on behalf of the respondent was directed toward justifying the market administrator's reclassification on the basis of lack of records to verify the reported disposition of the milk in controversy as Class IV-B.

After the hearing, the petitioner filed proposed findings, conclusions and order and a supporting brief. The respondent filed a brief in support of its position and subsequently the petitioner filed a reply brief. On October 8, 1948, the presiding officer filed a report recommending that the relief petitioned for be granted. The respondent filed exceptions to the report and a supporting brief and requested oral argument. Thereafter, the presiding officer filed a revision of his report making slight modifications in language, but without changing the recommendation that the requested relief be granted. The respondent excepted to the revision of the report and renewed the request for oral argument, which was held before me in New York, New York.

To facilitate understanding of the problem presented, the pertinent provisions of the order are set out here and are as follows :

"**Sec. 927.3 Classification of milk.** (a) *Basis of classification* \* \* \*. In establishing the classification of any milk received at a plant from producers, the burden rests upon the handler who received the milk from producers to show that it should not be classified as Class I milk; \* \* \*

"(b) *Classes of utilization* \* \* \*. (1) Class I milk shall be all milk \* \* \* the classification of which is not established in some other class named in this paragraph, \* \* \*

"(10) Class IV-B milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of Cheddar cheese, American Cheddar cheese, Colby cheese, washed curd cheese, or part-skim Cheddar cheese. \* \* \*

"**Sec. 927.5 Reports of handlers.** (a) *Monthly reports.* On or before the 10th day of each month, each handler shall report to the market administrator, in the manner and on forms prescribed by the market administrator, with respect to milk received at each plant during the preceding month: \* \* \*

"(2) The total quantity of such milk and of each product of such milk moved out of, or on hand at, such plant within 8 days after the end of such month, the butterfat content of each product, and the destination of any milk which moved out of such plant; \* \* \*

(c) *Verification of reports and payments.* The market administrator shall promptly verify all reports and payments of each handler by audit of such handler's records and of the records of any other handler or person upon whose disposition of milk such handler claims classification, and each such handler shall, during the usual hours of business, make available to the market administrator or his representative such records and facilities, of his own or of other persons, as will enable the market administrator to:

"(1) Verify the receipts and disposition of all milk required to be reported pursuant to this section, and, in case of errors or omissions, ascertain the correct figures; \* \* \*."

#### FINDINGS OF FACT

1. Petitioner, Potsdam Creamery, Inc., 99 Hudson Street, New York, New York, is a New York corporation and a handler under Order No. 27, as amended. In April 1945, petitioner sold and delivered milk to the Sunette Cheese Company at the Morley Dairy Products plant at Morley, New York, where the milk was to be made into Cheddar cheese for Sunette on a custom basis. Lee Fairbanks operated the plant of Morley Dairy Products.

2. In petitioner's monthly report to the market administrator for April 1945, petitioner reported this milk as Class IV-B, the Cheddar cheese classification, and accounted for the milk on that basis. The report gave Sunette Cheese Company, Morley, New York, as the purchaser of the milk. It also listed Sunette Cheese Company, Hermon, New York, as the purchaser of 1,254,515 pounds of additional milk utilized in IV-B. This latter milk is not in issue here.

3. In July 1945, an auditor from the market administrator's office, J. Arthur Johnson, visited the Morley Dairy Products plant at Morley, New York. The purpose of the visit was to verify the report or reports of a handler or handlers, other than petitioner, as to the

production of butter at the Morley Dairy Products plant. When Johnson arrived at the plant, it was being rehabilitated and he was told by a Mr. Davidson that he would have to go to Hermon, New York, where Lee Fairbanks operated another plant, for the records involving the Morley plant. Johnson was accompanied by another auditor from the market administrator's staff, J. C. Carey, who was assisting Johnson. Johnson apparently was able to find satisfactory record substantiation of butter manufacture and disposition. It came to his attention that cheese also was manufactured at the Morley plant, and he made some inquiry as to the cheese operation. Johnson was not making a specific audit of petitioner's report as to IV-B classifications and the record of this proceeding is not clear as to how far Johnson went in making it plain to Fairbanks that he was looking for any substantiating records of the IV-B classifications reported by petitioner. However, in Johnson's report to his superiors on the results of his audit there is a section headed "Cheese Operation" in which are the statements: "Cheese plant entirely destroyed by fire on April 18, 1945" and "All records of milk purchases, production, disposition, etc. are at Sunette Cheese Corp., N. Y. City offices." Nevertheless, in connection with his audit of the Morley plant operations, Johnson was shown by Fairbanks a record of a report for the month of April 1945 to the United States Department of Agriculture and War Food Administration in cooperation with the Food Rationing Division, Office of Price Administration, showing that all milk received at the plant during April 1945 was manufactured into cheese. This record of the report, page 1 of Exhibit 4 in this proceeding, shows also the manufacture of butter from cream (whey) and explains a difference in the butter figures on the ground that a quantity of butter was burned in a fire April 19 which burned the plant. This particular record was stamped by auditor Carey who was assisting Johnson. Apparently Johnson was primarily interested in checking butter manufacture and disposition rather than cheese and considered this document only in its relationship to butter. At the hearing on the petition, Mr. Johnson could not recall seeing other records of the Morley plant involving cheese manufacture, pages 2, 3 and 4, Exhibit 4, in this proceeding, which consisted of reports to the Office of Price Administration and other Government agencies claiming payments in connection with the purchase and sale of Cheddar cheese. Mr. Carey did not testify at the hearing and is no longer in the employ of the market administrator.

4. Subsequently, but at sometime prior to October 12, 1945, Irwin Ross, auditor, and Charles Stearn, a supervising auditor, both from the market administrator's staff, conducted an audit at the office of the

Sunette Cheese Corporation, 20 Harrison Street, New York, New York, in order to verify petitioner's reported Class IV-B uses for March and April, 1945. Following this audit, Mr. Ross submitted to the market administrator's office a sheet captioned "Summary of operations April 1945" (Exhibit 3). This summary was made up primarily from daily plant reports sent by Morley Dairy Products to the Sunette Company and from records of the Sunette Company which included sales invoices and trucking receipts. The summary shows 940 cheeses on hand at the Morley plant on April 1, 1945, and shows 2,080 cheeses made during the month, making a total of 3,020 cheeses. The summary further shows 1,950 cheeses accounted for as having been sold to McCadam, 94 cheeses as having gone to Sunette, and 976 cheeses attributed to "Loss—Due to fire at plant." The summary also contains the statement at the bottom as follows: "Handler had a fire at the plant and was able to salvage only 94 cheeses—The balance was lost." The summary further shows a computation of the milk equivalent of each cheese obtained by dividing the total number of cheeses made during the month, 2,080, which includes the 976 cheeses claimed to have been lost or damaged due to the fire, into the total poundage of milk recorded as having been received at the plant during the month. Irwin Ross also prepared a memorandum dated October 12, 1945, to Mr. E. Nuclo, chief accountant in the market administrator's office, stating, in substance, that a fire caused the complete destruction of the Morley Dairy Products cheese plant on April 19, 1945, and that the fire burned 976 cheeses, that "the handler", presumably Sunette, paid Morley Dairy Products for all cheese made, that the handler carried no insurance for the loss and that no substantiation is available other than the handler's plant records. Following Ross' signature to the memorandum there was subsequently written, "We are classifying the milk equivalent of the cheeses destroyed by fire as Class I M A as per instructions of Mr. Nuclo. Chas. Stern." The evidence in this proceeding does not reveal whether these auditors sought additional documents or information from the Morley plant.

5. In January 1946, petitioner was billed by the market administrator for a charge of \$6,008.37 as a result of the reclassification to Class I-A of 447,584 pounds of milk reported by petitioner as having been utilized in Class IV-B. The amount of milk reclassified represents the amount of milk equivalent of the 976 cheeses regarded as "not accounted for" or as not entitled to the Class IV-B classification by the market administrator.

6. At some time in the first part of 1946, Mr. Nuclo had a discussion with an accountant, Mr. Alfred Sperber, representing the petitioner. At the discussion or later, Mr. Nuclo was given copies of three affi-

affidavits relating to the fire at the Morley plant and the disposition of cheese damaged in the fire. Two of the affidavits are from inspectors of the Department of Agriculture and Markets, State of New York, George F. Bench and Ben Wardell, and the other is from Fay Middlemiss, Madrid, New York.

7. The affidavit from Mr. Bench is as follows:

"The cheese and butter factory known as Morley Dairy Products, located at Morley, N. Y., burned April 19, 1945. Inspector Wardwell and I arrived there a few hours following the fire.

"They were making Cheddar Cheese at the plant previous to the fire, so there was a large amount of cheese damaged by smoke and heat from the fire. I called there several times during the following week as I felt it was my duty to watch the disposal of the cheese.

"We salvaged 2,815 lbs. Cheddar Cheese, cleaning it up, boxing it and shipped same to Sunette Cheese Corp., New York City. Through Lee Fairbanks of Hermon, N. Y. (Owner of Morley Dairy Products) Mr. Fay Middlemiss of Madrid, N. Y., contacted me April 23, 1945, and I bargained with him to take away all the remaining cheese, which was to be used for animal feed, only. He trucked it away and we estimated there was approximately sixteen tons."

8. The affidavit from Mr. Wardwell is as follows:

"The cheese and butter factory known as Morley Dairy Products, located at Morley, N. Y. and owned and operated by Lee Fairbanks of Hermon, N. Y. burned April 19, 1945. Inspector Bench of Ogdensburg, N. Y. and I arrived there a few hours following the fire.

"They were making Cheddar cheese at the plant previous to the fire, so there was a large amount of cheese damaged by smoke and heat from the fire.

"I called there once or twice later, but as it was in Mr. Bench's territory, he arranged with Lee Fairbanks as to the proper disposal of the cheese."

9. The affidavit from Mr. Middlemiss is as follows:

"The plant known as Morley Dairy Products, in Morley, N. Y. was destroyed by fire during April, 1945. There was a large amount of American Cheddar Cheese effected by smoke from the fire.

"I arranged with the New York State Inspector Bench of Ogdensburg, N. Y. on April 23, 1945 to remove all the damaged cheese. It was trucked to my home at Madrid, N. Y. by my own truck and was used by me for animal feed. The quantity I received was approximately sixteen tons."

10. The market administrator's billing or charge as the result of the reclassification was not withdrawn following the discussion of Sperber with Nuclo and the submission of the affidavits.

11. The 976 cheeses, the milk equivalent of which was reclassified from Class IV-B to Class I by the market administrator, were manufactured from petitioner's milk, were damaged by fire at the Morley plant, and were disposed of to Fay Middlemiss.

12. There is no allegation and no indication in the record of any disposition of milk other than as claimed by petitioner, nor of any attempted fraud or concealment by petitioner.

### CONCLUSIONS

The respondent does not deny that a fire occurred at the Morley Dairy Products plant and that cheese manufactured at the plant was damaged and disposed of as claimed by petitioner. The respondent's position is that, at the time of the audit of petitioner's report for April 1945, *records* verifying the reported Class IV utilization were not made available to the market administrator's auditors. Hence, respondent's point of view strongly urged is that the facts as to what happened, established by evidence in this proceeding, are immaterial and irrelevant since the controlling issue is whether there existed and were supplied *records* verifying the disposition in Class IV-B of the milk equivalent of the 976 damaged cheeses.

It is not entirely clear whether respondent's position is that the "make" of cheese was not verified by records of disposition of cheese manufactured or that, regardless of manufacture, the classification hinges upon movement of cheese from the plant with records of such movement lacking.

There is a little confusion, too, in the circumstances surrounding the audit. Auditor Johnson or his assistant Cary, as revealed by Finding of Fact 3, saw a record setting out that there was a fire at the Morley plant which destroyed 420 pounds of butter. There were some other records apparently not seen by Johnson or Cary consisting of reports of manufacture of cheese to Government agencies. But because Johnson was told by Fairbanks that the records pertaining to cheese production were at Sunette's office, no records other than those at Sunette's office were considered in determining whether petitioner's report was verified. From the evidence in this proceeding, it is difficult to tell also whether it was brought home to petitioner or Sunette during the audit that verification appeared questionable or improbable and that any other records bearing on the question should be produced.

At any rate, we have a situation where an unusual contingency arose, a fire at the plant which damaged cheese. There was an out-of-the-ordinary disposition of the damaged cheese arranged by a public official representing the State of New York. The disposition was not in regular commercial channels. Section 927.5 of the order does not describe or specify the kinds of records to be made to supply verification and, to use a word in bad repute as "gobbledygook", no "implementing" published rules or instructions have been brought to our attention. As pointed out by petitioner, the order is not explicit either as to the time when the records are to be supplied in verification. This proceeding shows that if petitioner knew or had been made aware of deficiency by way of records as to what happened to the damaged cheeses, a record of disposition could have been made. The affidavits



mentioned in Findings of Fact 6, 7, 8 and 9 could have been supplied before the reclassification and indeed could have been obtained at the time of the disposition. We do not believe that in the unique situation presented, the same rigid accounting rules should be followed as in the case of ordinary commercial transactions, especially when as early as Johnson's visit to the plant in July 1945 or before, the market administrator's office was on notice that a fire had occurred at the plant and that all the milk received at the plant from April 1 to April 18 was claimed to have been manufactured into cheese.

Under all the circumstances, we agree with the examiner that the reclassification from Class IV-B to Class I was "not in accordance with law."

### ORDER

The relief requested by petitioner is granted.

Copies hereof shall be served upon the parties and the market administrator for Order No. 27, as amended, by registered mail or in person.

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(No. 2409)

*In re* FRANK CARSON, D. B. A. THE CARSON LIVESTOCK COMMISSION COMPANY. P&S Doc. No. 1862. Decided April 4, 1950.

### Cease and Desist—Violations of Act

Where the order of inquiry charged respondent with wilful violations of various provisions of the act and the respondent admitted such allegations but denied wilfulness in connection therewith and consented to a cease and desist order, which was recommended by the Livestock Branch, the respondent is ordered to cease and desist from failing to report on accounts of sale the correct names of purchasers of consigned livestock sold by respondent on a commission basis; failing to render reasonable and just selling services; engaging in unfair and deceptive practices; selling livestock bought by employees as dealers in competition with livestock consigned to respondent for sale for accounts of shippers on commission; failing to keep full and correct accounts and records of transactions in his business; making or causing to be made false entries in his accounts, books and records; and selling consigned livestock to an employee.\*

*Mr. Jerome S. Ducrest* for complainant. *Mr. Frank Carson*, of Fort Worth, Texas, *pro se*.

*Decision by Thomas J. Flavin, Judicial Officer*

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to as the act. The order of inquiry and notice of hearing, filed January 4, 1950, alleges that respondent wilfully violated several different provisions of the act and several regulations issued thereunder. The answer of the respondent, filed January 23, 1950, in effect admits the facts alleged in the order of inquiry, denies that respondent wilfully violated the act and the regulations, and states that permitting employees of market agencies to speculate in livestock had been a common practice on the stockyards for many years. The respondent states that he does not wish an oral hearing.

### FINDINGS OF FACT

1. The Fort Worth Stock Yards, Fort Worth, Texas, hereinafter referred to as the stockyards, was at all times mentioned herein a posted stockyard under the provisions of the act.

2. At all times mentioned herein, the respondent was registered with the Secretary of Agriculture as a market agency to buy and sell livestock on a commission basis at the stockyards.

3. On or about December 26, 1946, the respondent sold at the stockyards one heifer, consigned to him for sale on a commission basis by Emory Talen, to Pierce Carson, an employee of respondent, and on the account of sale rendered to said consignor, the respondent reported the purchaser of said heifer as "Pierce."

4. On or about December 26, 1946, the respondent sold at the stockyards one calf, consigned to him for sale on a commission basis by W. Carlack, to Pierce Carson, an employee of respondent, and on the account of sale rendered to said consignor, the respondent reported the purchaser of said calf as "Pierce."

5. On or about January 10, 1947, the respondent sold at the stockyards one heifer, consigned to him for sale on a commission basis by Banks and Rowan, to Pierce Carson, an employee of respondent, and on the account of sale rendered to said consignor, the respondent reported the purchaser of said heifer as "Jackson."

6. On or about January 17, 1947, the respondent sold at the stockyards two calves, consigned to him for sale on a commission basis by Tom Seeley, to Pierce Carson, an employee of respondent, and on the account of sale rendered to said consignor, the respondent reported the purchaser of the two calves as "Jackson."

7. On or about February 12, 1947, the respondent sold at the stockyards nine cattle, consigned to him for sale on a commission basis by W. L. Brooks, to Pierce Carson, an employee of respondent,

and on the account of sale rendered to said consignor, the respondent reported the purchaser of the nine cattle as "Fifer-Jackson."

8. On or about April 16, 1947, the respondent sold at the stockyards four calves, consigned to him for sale on a commission basis by Fred Wingfield, to Pierce Carson, an employee of respondent, and on the account of sale rendered to said consignor, the respondent reported the purchaser of the four calves as "Jackson."

9. On or about May 15, 1947, the respondent sold at the stockyards one cow, consigned to him for sale on a commission basis by L. Torpley, to Pierce Carson, an employee of respondent, and on the account of sale rendered to said consignor, the respondent reported the purchaser of the cow as "Jackson."

10. At divers other times during the years 1946 and 1947, the respondent sold at the stockyards livestock consigned to him for sale on a commission basis to Pierce Carson, an employee of respondent, and on the accounts of sale rendered to the consignors, the respondent reported false or fictitious names as the purchasers of the livestock.

11. Copies of the accounts of sale on which the purchasers of livestock were falsely reported formed a part of the books, records and memoranda of the respondent's business.

12. On or about January 3, 1947, the respondent sold at the stockyards, in competition with livestock consigned to him for sale on a commission basis by various consignors, one cow for the account of Pierce Carson, an employee of respondent, which said employee had purchased at the stockyards on a dealer basis.

13. On or about January 21, 1947, the respondent sold at the stockyards, in competition with livestock consigned to him for sale on a commission basis by various consignors, eight calves for the account of Pierce Carson, an employee of respondent, which said employee had purchased at the stockyards on a dealer basis.

14. On or about February 3, 1947, the respondent sold at the stockyards, in competition with livestock consigned to him for sale on a commission basis by various consignors, three cattle for the account of Pierce Carson, an employee of respondent, which said employee had purchased at the stockyards on a dealer basis.

15. On or about April 18, 1947, the respondent sold at the stockyards, in competition with livestock consigned to him for sale on a commission basis by various consignors, one calf for the account of Pierce Carson, an employee of respondent, which said employee had purchased at the stockyards on a dealer basis.

16. On or about April 29, 1947, the respondent sold at the stockyards, in competition with livestock consigned to him for sale on a commission basis by various consignors, one steer for the account of

Pierce Carson, an employee of respondent, which said employee had purchased at the stockyards on a dealer basis.

17. On or about June 19, 1947, the respondent sold at the stockyards, in competition with livestock consigned to him for sale on a commission basis by various consignors, three heifers for the account of Pierce Carson, an employee of respondent, which said employee had purchased at the stockyards on a dealer basis.

18. At divers other times during the year 1947, the respondent sold at the stockyards, in competition with livestock consigned to him for sale on a commission basis by various consignors, livestock for the account of Pierce Carson, an employee of respondent, which said employee had purchased at the stockyards on a dealer basis.

### CONCLUSIONS

The respondent was registered and operating as a market agency to buy and sell livestock on a commission basis for others. In so doing he was acting as the agent for those for whom he bought and sold livestock. In selling livestock as the agent for the shipper he was required to give the shipper undivided loyalty. In the instances referred to above, he permitted an employee to purchase certain livestock out of consignments. As to such livestock the employee's loyalty to his employer's principal would necessarily be divided. The rule is that an agent must not let any conflicting interest on his part or on the part of his employees intervene against the principals' interests. This rule of agency, based on fairness, is true without reference to the provisions of the act or regulations. The respondent's employees in buying livestock created a situation where their personal interest conflicted with the duty they owed respondent's principals. This was a clear violation of the act.

Moreover, an agent is required to report to his principals fully and accurately the details of execution of his principals' orders. The failure of the respondent to report the facts with respect to the names of the purchasers of their livestock sold by respondent on a commission basis resulted in the particularly important fact that respondent's employee had purchased their livestock being concealed from the principals.

From what has been said, it is clear that respondent failed to render reasonable selling services in violation of section 304 of the act and engaged in unfair practices and devices in violation of sections 307 and 312 (a) of the act. The accountings to respondent's principals in which the purchasers of the principals' livestock were not correctly reported was a violation of section 201.43 of the regulations and the dealing in consigned livestock by respondent's employee was in

violation of section 201.60 of the regulations. Since copies of the accounts of sale which incorrectly reported the names of purchasers were made a part of the respondent's accounts and records, the respondent, thereby, violated section 10 of the so-called Federal Trade Commission Act, which section is incorporated in and made a part of the Packers and Stockyards Act by section 402 of the latter act, and also violated section 401 of the act in that the respondent's books and records did not fully and correctly disclose all transactions in respondent's business.

This is the first proceeding under the act against the respondent who has denied that the violations alleged were wilfull. There is nothing to indicate that the respondent personally profited from any of the violations complained of. The violations stemmed from negligence on the part of the respondent in permitting one of his employees to speculate in consigned livestock. In view of those facts, a suspension of the respondent's registration should not be ordered, but respondent should be ordered to cease and desist.

#### ORDER

The respondent and his employees shall cease and desist from:

1. Failing to report on accounts of sale the correct names of purchasers of consigned livestock sold by the respondent on a commission basis;
2. Failing to render reasonable and just selling services;
3. Engaging in unfair and deceptive practices;
4. Selling livestock bought by employees as dealers in competition with livestock consigned to respondent for sale for accounts of shippers on a commission basis;
5. Failing to keep such accounts, records and memoranda as fully and correctly reflect all transactions in respondent's business;
6. Making or causing to be made false entries in respondent's accounts, books and records; and
7. Selling consigned livestock to an employee.

A copy of this order shall be served upon the respondent and shall become effective five days after service.

(No. 2410)

*In re* H. M. HOWELL, D.B.A HOWELL BROS. LIVE STOCK COMMISSION COMPANY. P&S Doc. No. 1872. Decided April 4, 1950.

#### Cease and Desist—Violations of Act

Where the order of inquiry charged respondent with wilful violations of various provisions of the act and the respondent, in his answer, admitted such allegations and consented to a cease and desist order, which was recom-

mended by the Livestock Branch, the respondent is ordered to cease and desist from failing to show the true names of purchasers on accounts of sale rendered to consignors for whom respondent has sold livestock on a commission basis; failing to show on accounts of sale rendered to consignors that consignors' livestock have been used to fill orders handled by respondent on a commission basis; permitting his employees or agents to deal in consigned livestock; failing to keep such accounts, records and memoranda as would fully disclose all transactions in respondent's business; failing to render just and reasonable buying and selling services; failing to report on accounts of purchase rendered to his principals that livestock have been purchased out of consignments received by respondent for sale on a commission basis; and selling livestock purchased by respondent's employees on a speculative basis in competition with livestock consigned to respondent for sale on a commission basis.\*

*Mr. Jerome S. Ducrest* for complainant. *Mr. Henry M. Howell*, of Fort Worth, Texas, *pro se*.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to as the act. The order of inquiry and notice of hearing, filed February 10, 1950, alleges that respondent wilfully violated several different provisions of the act and of the regulations issued thereunder. The answer of the respondent, filed March 6, 1950, in effect admits the facts alleged and consents to the issuance of a cease and desist order. With respect to several violations alleged, the respondent states that he did not realize that he was violating the act.

### FINDINGS OF FACT

1. The Fort Worth Stock Yards, Fort Worth, Texas, hereinafter referred to as the stockyards, was at all times mentioned herein a posted stockyard subject to the provisions of the act.

2. At all times mentioned herein, the respondent was registered with the Secretary of Agriculture as a market agency to buy and sell livestock on a commission basis at the stockyards.

3. On or about the dates set forth in the table below, and at divers other times during the years 1945 to 1948, inclusive, the respondent through his employees, sold at the stockyards livestock consigned to him for sale on a commission basis to Jeff Tidwell, an employee of respondent, and, in accounting to the consignors of the livestock, rendered accounts of sale which showed false or fictitious names as the purchasers of their livestock.

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

Date of sale	Consignor	Number and species of livestock	Name under which livestock bought
<b>1945</b>			
July 2.....	Frank Higgs.....	1 cattle.....	Ware No. 1.
Aug. 1.....	Tony Barcelona.....	do.....	Do.
Aug. 29.....	Hugh Marshall.....	2 calves.....	Do.
Aug. 31.....	C. N. Hart.....	1 cattle.....	Do.
Sept. 19.....	Roy Swann.....	do.....	Do.
Oct. 1.....	B. G. Thompson.....	do.....	Do.
Oct. 22.....	Jack Hatcher.....	do.....	Do.
Oct. 31.....	Sam Fachorn.....	2 cattle.....	Do.
Nov. 2.....	Henry Moehlman.....	6 cattle.....	Do.
Nov. 15.....	Hand and Son.....	2 cattle.....	Ware.
Nov. 19.....	R. E. Lane.....	1 cattle.....	Ware No. 1.
Nov. 26.....	Wid Phillips.....	do.....	Do.
Dec. 3.....	H. G. Prather.....	do.....	Do.
Dec. 6.....	J. L. Mouldin.....	4 cattle.....	Do.
Dec. 10.....	J. C. Howell.....	3 cattle.....	Do.
Dec. 12.....	Hand and Son.....	1 cattle, 1 calf.....	Do.
Dec. 13.....	Tony Barcelona.....	1 cattle.....	Do.
Dec. 13.....	Wid Phillips.....	2 cattle.....	Do.
<b>1946</b>			
Oct. 31.....	H. D. Hall.....	3 cattle.....	Howell No. 3.
Nov. 12.....	A. J. Hall.....	2 calves.....	Do.
Nov. 20.....	C. O. Hawkins and Son.....	1 calf, 1 cattle.....	Howell No. 5.
Nov. 20.....	H. A. Anderson.....	1 cattle, 1 calf.....	Do.
Dec. 9.....	H. W. Moehlman.....	2 cattle, 2 calves.....	Howell No. 3.
Dec. 9.....	Bob Huddleston.....	12 cattle, 12 calves.....	Do.
Dec. 11.....	D. G. Cowan.....	1 cattle, 1 calf.....	How-3.
Dec. 11.....	H. W. Moehlman.....	2 cattle, 4 calves.....	Southern.
Dec. 11.....	C. N. Hart.....	6 cattle.....	Do.
<b>1947</b>			
Apr. 30.....	M. H. Ethridge.....	1 cattle.....	Howell No. 3.
May 5.....	Alvin Fritcher.....	do.....	Johnson.
July 9.....	W. H. Herring.....	1 calf.....	Thompson.
Oct. 1.....	H. Garltz.....	3 calves.....	Howell No. 3.
Oct. 13.....	Jack Hatcher.....	1 calf.....	Do.
Nov. 13.....	do.....	1 heifer.....	Do.
Nov. 17.....	do.....	2 heifers.....	Howell No. 7.
Nov. 17.....	do.....	1 calf.....	Howell No. 3.
Dec. 23.....	M. H. Ethridge.....	1 heifer.....	Thompson.
<b>1948</b>			
Mar. 29.....	Sleede Ashton.....	1 steer.....	How. Thompson.
Apr. 5.....	Jack Hatcher.....	2 calves.....	Thompson.

4. On or about the dates set forth in the table below and at divers other times during the years 1945 and 1947, the respondent used livestock consigned to him for sale on a commission basis to fill orders from various purchasers for the purchase of livestock on a commission basis and, in accounting to the consignors, failed to disclose fully and correctly the fact that the livestock was sold to purchasers for whom the respondent was filling orders on a commission basis and, in accounting to the purchasers of the livestock for whom he was filling orders on a commission basis, failed to disclose fully and correctly to such purchasers that the livestock was purchased out of consignments received by him for sale on a commission basis.

Date	Consignor	Number and species of livestock	Person or agency for whom livestock purchased
<b>1946</b>			
July 30.....	J. D. Ashton.....	5 cattle.....	Southern Packing Co.
	Gaines Maxwell.....	1 cattle.....	Do.
Aug. 14.....	T. M. Allen.....	do.....	Do.
Aug. 16.....	H. V. Wagley.....	do.....	Do.
	R. L. Sanders.....	1 hog.....	Texas Prison System.
Sept. 7.....	I. V. Duncan & Son.....	1 cattle.....	Charles McCullough.
Sept. 11.....	R. D. Barker.....	2 cattle.....	Southern Packing Co.
Sept. 13.....	Wid Phillips.....	1 cattle.....	Do.
	A. G. Easterling.....	4 cattle.....	Do.
Sept. 20.....	R. L. Wyatt.....	2 cattle.....	Do.
	Wid Phillips.....	do.....	Do.
<b>1947</b>			
July 7.....	Jack Hatcher.....	1 cattle.....	Do.
July 28.....	Cecil C. Maxey.....	3 calves.....	Do.
July 29.....	A. D. Young.....	1 cattle.....	W. H. Herring.
	H. E. Wallis.....	do.....	Do.
Aug. 5.....	S. J. Tyre.....	do.....	Wid Phillips.
	B. G. Thompson.....	3 cattle.....	Southern Packing Co.
Aug. 25.....	Jack Hatcher.....	1 cattle.....	Do.
	Jack Earnest.....	do.....	Do.
	W. B. Clark.....	do.....	Do.
	S. Clark.....	2 cattle.....	Do.

In connection with certain of the above-mentioned transactions, respondent, in accounting to the consignors of the livestock, also failed to show the full, true and correct name of the purchaser of their livestock, as follows:

Date of sale	Consignor	Number and species	Name shown on account of sale	Actual purchaser
<b>1946</b>				
July 30.....	J. D. Ashton.....	5 cattle.....	Howell-SP.....	Southern Packing Co.
	Gaines Maxwell.....	1 cattle.....		
Aug. 14.....	T. M. Allen.....	do.....		
Sept. 7.....	H. V. Wagley.....	do.....	Howell-M.....	Charles McCullough.
	I. V. Duncan & Son.....	do.....		
Sept. 13.....	Wid Phillips.....	do.....	Howell-SP.....	Southern Packing Co.
	A. G. Easterling.....	4 cattle.....		
Sept. 20.....	R. L. Wyatt.....	2 cattle.....		
	Wid Phillips.....	do.....		
<b>1947</b>				
July 28.....	Cecil C. Maxey.....	3 calves.....	Howell-H.....	W. H. Herring.
July 29.....	A. D. Young.....	1 cattle.....		
	H. E. Wallis.....	do.....		
Aug. 5.....	S. J. Tyre.....	do.....	Howell.....	Wid Phillips.

5. On the numerous dates set forth in paragraph V (a) and (b) of the order of inquiry and at divers other times during the years 1946 to 1949, inclusive, the respondent sold at the stockyards for Jeff Tidwell or Oscar Tidwell, both employees of respondent, in competition with livestock consigned to respondent for sale on a commission basis, livestock which the said Jeff Tidwell or Oscar Tidwell had purchased at the stockyards as a dealer for resale for his own speculative account.

6. Respondent, on or about the dates set out in the table below and at divers other times during the years 1946 and 1947, sold at the stock-



yards livestock consigned to him for sale on a commission basis to Jeff Tidwell, an employee of respondent, and, in accounting to the consignors of the livestock, rendered accounts of sale which showed false or fictitious names as the purchasers of their livestock. Respondent later resold such livestock for said Jeff Tidwell in competition with livestock consigned to respondent for sale on a commission basis.

Date	Consignor	Number and species of livestock	Name of purchaser shown on account of sale	Date of resale
<b>1946</b>				
Oct. 7.....	C. W. Mills.....	1 calf.....	Howell No. 3.....	Oct. 7
Oct. 8.....	R. H. Seale, Estate.....	1 cattle.....	do.....	Oct. 8
Oct. 9.....	Joe A. Reeves.....	2 cattle, 2 calves...	H No. 3.....	Do.
Oct. 9.....	J. E. Elliott.....	5 calves.....	Howell No. 3.....	Oct. 9
Oct. 10.....	J. C. Howell.....	2 cattle.....	Johnson.....	Oct. 10
Nov. 20.....	M. S. Hollday.....	1 cattle, 1 calf.....	Howell No. 5.....	Nov. 20
	H. A. Anderson.....	do.....	do.....	Do.
<b>1947</b>				
Feb. 17.....	Luther Cavender.....	1 cattle.....	Robertson.....	Feb. 17

### CONCLUSIONS

The respondent was registered as and was operating as a market agency to buy and sell livestock on a commission basis for others. He was an agent for those for whom he sold or bought livestock. He knew that he was subject to the act because he registered pursuant to the act. His claim that he did not know what the act and the regulations provided can hardly excuse the violations. He was obliged to learn what the act and the regulations required with respect to the conduct of his business. His plain disregard of his duty to inform himself is no excuse.

Notwithstanding the respondent's non-familiarity with the act and the regulations, the respondent should have been aware that what he did was wrong. A person cannot serve two masters. Yet that is what respondent, through his employees, was attempting to do. As an agent for a shipper of livestock, the respondent and his employees were required to give the shipper undivided loyalty and as agent of the buyer of livestock, respondent and his employees were required to give the buyer undivided loyalty. Here respondent permitted his employees to speculate in consigned livestock in violation of the duty owed the shipper. The rule is that an agent must not let any conflicting interest on his part, or on the part of his employees, intervene against the principals' interests. Common standards of fair play and good business require as much without reference to the provisions of the act and the regulations.

Moreover, an agent is required to report to his principals fully and accurately the details of his execution of their orders. The failure of

respondent when he used consigned livestock in filling orders he handled on a commission basis to report the facts with respect to the source of livestock used on orders or to report to the seller the disposition of livestock concealed from respondent's principals particularly important and significant facts which the principals were entitled to know.

From what has been said, it is clear that the respondent failed to render reasonable buying and selling services in violation of section 304 of the act, and engaged in unfair and deceptive practices in violation of section 307 and 312 (a) of the act. Section 201.43 of the regulations, dealing with accountings to principals, was violated and section 201.60 of the regulations, which prohibits a market agency from permitting its officers, agents and employees to deal in consigned livestock, was violated. Copies of accounts of sale which falsely reported the names of the purchasers of livestock formed a part of the respondent's books and records. Therefore, section 10 of the so-called Federal Trade Commission Act, which section is incorporated in and made a part of the Packers and Stockyards Act by section 402 of the latter act, was violated, as well as was section 401 of the act which requires the keeping of accounts, records and memoranda which fully and correctly disclose all transactions in respondent's business.

The plain disregard of the requirements of the act and the regulations and the respondent's apparent insensitiveness to accepted standards of fairness are probably sufficient to support the charge of wilfulness in the order of inquiry. *Brinkley Mining Company v. Wheeler*, 133 F. (2nd) 863 (1945) and *Bowles v. Ward*, 65 F. Supp. 880 (1946). It appears, however, that respondent did not profit personally from the transactions referred to in the order of inquiry. His violations arose from neglect of his duty as an agent rather than from a desire to profit personally. He permitted his employees to speculate in consigned livestock and profit therefrom. Inasmuch as respondent did not engage in the practice of dealing at the market and did not personally profit from dealing operations engaged in by his employees, and since this is the first proceeding under the act against respondent, it is believed that a suspension of respondent's registration should not be ordered. However, he should be ordered to cease and desist from further violating the act and the regulations.

#### ORDER

The respondent shall cease and desist from the following:

1. Failing to show the true names of purchasers on accounts of sale rendered to consignors for whom respondent has sold livestock on a commission basis.

2. Failing to show on accounts of sale rendered to consignors that consignors' livestock have been used to fill orders handled by respondent on a commission basis.

3. Permitting his employees or agents to deal in consigned livestock.

4. Failing to keep such accounts, records and memoranda as would fully disclose all transactions in respondent's business.

5. Failing to render just and reasonable buying and selling services.

6. Failing to report on accounts of purchase rendered to his principals that livestock have been purchased out of consignments received by respondent for sale on a commission basis.

7. Selling livestock purchased by respondent's employees on a speculative basis in competition with livestock consigned to respondent for sale on a commission basis.

A copy of this order shall be served upon the respondent and it shall become effective five days after service.

(No. 2411)

*In re* JERRY RALLS AND FARIS CALLAN, PARTNERS, FORMERLY D. B. A.  
RALLS-CALLAN LIVESTOCK COMMISSION COMPANY. P&S Doc. No.  
1860. Decided April 4, 1950.

#### Cease and Desist—Violations of Act

Where the order of inquiry charged respondent with wilful violations of various provisions of the act and the respondents, in their answer, admitted certain allegations of fact alleged in the order of inquiry and explained others and consented to a cease and desist order, which was recommended by the Livestock Branch, the respondents are ordered to cease and desist from failing to render reasonable buying and selling services; engaging in unfair and deceptive practices; assessing and charging rates or charges other than those set out in respondents' tariffs on file with the Secretary; failing to keep full and correct accounts and records of all transactions in respondents' business; causing false copies of accounts of purchase and accounts of sale to be made a part of respondents' accounts and records; purchasing livestock out of consignments for sale on a commission basis except as permitted by the regulations; permitting their employees to deal in consigned livestock, and selling livestock acquired by the respondents' employees on a dealer basis in competition with livestock consigned to respondents for sale for the accounts of shippers on commission.\*

*Mr. Jerome S. Ducrest* for complainant. *Messrs. Jerry Ralls and Faris Callan*, of Fort Worth, Texas, *pro se*.

*Decision by Thomas J. Flavin, Judicial Officer*

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

**PRELIMINARY STATEMENT**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to as the act. The order of inquiry and notice of hearing, filed January 4, 1950, alleges that respondents wilfully violated several different provisions of the act and the regulations issued thereunder.

Respondent Jerry Ralls filed an answer on January 16, 1950, in which he admitted some of the allegations in the order of inquiry and explained how the transactions referred to in others happened to occur. The explanation amounts to an admission of the facts alleged but a denial of any wilful violations. Respondent Ralls, by letter to the Hearing Clerk, dated February 2, 1950, consented to a cease and desist order without a hearing. Respondent Faris Callan filed an answer on January 12, 1950, in which he states that he no longer has an interest in respondent firm and that at the time of the transactions complained of in the order of inquiry he was only the office manager and had nothing to do with what happened out in the stockyards. The records of the Livestock Branch reveal that the registration of the respondent firm was made inactive on September 1, 1948, and Jerry W. Ralls re-registered on September 3, 1948, as an individual and has continued the business as Ralls and Company Livestock Commission. The transactions complained of in the order of inquiry all transpired before the respondent partnership was dissolved.

**FINDINGS OF FACT**

1. The Fort Worth Stock Yards, Fort Worth, Texas, hereinafter referred to as the stockyards, was at all times mentioned herein a posted stockyard under the provisions of the act.

2. The respondents, at the times of the transactions hereinafter referred to, were registered with the Secretary of Agriculture as a market agency engaged in the business of buying and selling livestock on a commission basis at the stockyards.

3. On the dates set out in paragraph III of the order of inquiry and at divers other times during the year 1946, the respondents, in connection with orders for the purchase of cattle filled by respondents on a commission basis for the Schubert Meat Company, Houston, Texas, arranged for and permitted Emmett Allen, a registered dealer, to purchase some of the livestock used in filling said orders and in each instance billed the Schubert Meat Company, in addition to the lawfully prescribed buying commission, an unauthorized charge which the respondents received and then paid to the said Emmett Allen for his buying services. Some of the cattle purchased by Emmett Allen

to fill the orders referred to were purchased by him from the respondents out of livestock consigned to the respondents for sale on a commission basis.

4. On the dates set out in paragraph IV of the order of inquiry and at divers other times during the years 1945 and 1946, the respondents, in connection with the sale at the stockyards of livestock consigned to them for sale on a commission basis by the consignors listed in paragraph IV and by various other consignors failed to render to the consignors true written accounts of such sales, in that the respondents submitted to the consignors accounts of sale which showed false or fictitious names as the purchasers of the livestock.

5. On the dates set forth in paragraph V of the order of inquiry and at divers other times during the years 1945 and 1946, respondents purchased for their own account livestock consigned to them for sale on a commission basis and, in accounting to each consignor, failed to show as the purchaser of such livestock the full, true and correct name of the respondent market agency, and rendered accounts of sale which showed false, incorrect or incomplete names as the purchasers of the livestock.

6. (a) On or about September 20, 1946, the respondents engaged in a dealer transaction through a trading partnership, composed of respondents and Andy Taylor, which was not registered with the Secretary of Agriculture as a dealer. Respondents, as a part of such dealer transaction, bought at the stockyards for the trading partnership 34 cattle, including at least 8 cattle consigned to them for sale on a commission basis by various consignors. Such livestock subsequently was resold for the trading partnership by Andy Taylor and the profit from the transaction was divided between respondents and said Andy Taylor.

(b) On or about September 26, 1946, the respondents engaged in a dealer transaction through a trading partnership, composed of respondents and Andy Taylor, which was not registered with the Secretary of Agriculture as a dealer. Respondents, as a part of such dealer transaction, sold at the stockyards to the trading partnership 51 cattle consigned to them for sale on a commission basis by various consignors. Such livestock subsequently was resold for the trading partnership by Andy Taylor and the profit from the transaction was divided between respondents and said Andy Taylor.

7. (a) On or about September 8, 1947, respondents sold at the stockyards to S. Latham, an employee of respondents, three calves consigned to them for sale on a commission basis by Sutton Dudley, Comanche, Texas.

(b) On or about September 29, 1947, respondents sold at the stockyards to S. Latham, an employee of respondents, one bull consigned to them for sale on a commission basis by Walter Brondon, Steventville, Texas.

(c) At divers other times during the year 1947, respondents sold at the stockyards to S. Latham, an employee of respondents, livestock consigned to them for sale on a commission basis.

8. (a) On or about November 20, 1946, respondents sold at the stockyards for the account of Leon Ralls, an employee of respondents, in competition with livestock consigned to respondents for sale on a commission basis by various consignors, seven cattle which said Leon Ralls had purchased at the stockyard on a dealer basis. Said cattle were sold to "Gib Wright," "Armour," "Neuhoff" and "Bluebonnet" at a profit of \$22.46 to said employee, Leon Ralls.

(b) On or about November 22, 1946, respondents sold at the stockyards for the account of Leon Ralls, an employee of respondents, in competition with livestock consigned to respondents for sale on a commission basis by various consignors, eight calves which said Leon Ralls had purchased at the stockyards on a dealer basis. Said calves were sold to "Swift" at a profit of \$10.99 to said employee, Leon Ralls.

(c) On or about November 25, 1946, respondents sold at the stockyards for the account of Leon Ralls, an employee of respondents, in competition with livestock consigned to respondents for sale on a commission basis by various consignors, one steer which said Leon Ralls had purchased at the stockyards on a dealer basis. Said steer was sold to "Kirk" at a profit of approximately \$11.50 to said employee, Leon Ralls.

(d) On or about April 8, 1947, respondents sold at the stockyards for the account of Leon Ralls, an employee of respondents, in competition with livestock consigned to respondents for sale on a commission basis by various consignors, 16 cattle which said Leon Ralls had purchased at the stockyards on a dealer basis. Said cattle were sold to "Geo. Haynes" and "City-B" at a profit of \$45.36 to said employee, Leon Ralls.

(e) On or about July 11, 1947, respondents sold at the stockyards for the account of Leon Ralls, an employee of respondents, in competition with livestock consigned to respondents for sale on a commission basis by various consignors, 39 cattle which said Leon Ralls had purchased at the stockyards on a dealer basis. Said cattle were sold to "Swift," "Graves" and "Whatley" at a profit of \$84.84 to said employee, Leon Ralls.

(f) At divers other times during the years 1946 and 1947, respondents sold at the stockyards for the account of Leon Ralls, an employee

of respondents, in competition with livestock consigned to respondents for sale on a commission basis by various consignors, livestock which said Leon Ralls had purchased at the stockyards on a dealer basis.

9. (a) On or about December 17, 1945, respondents permitted Leon Ralls and Robert Ralls, employees of respondents, to deal in livestock consigned to them for sale on a commission basis. Respondents sold at the stockyards to said employees four calves consigned to respondents for sale on a commission basis by A. A. Martin, Brownwood, Texas; 17 cattle consigned by W. F. Talley and E. C. Robertson, Grosvenor, Texas; and 16 cattle consigned by J. E. White, Greenville, Texas. Subsequently, respondents resold such 37 cattle at the stockyards to various buyers for the account of said Leon Ralls and Robert Ralls at a profit of \$43.12 to said employees. Respondents issued accounts of sale to said consignors, A. A. Martin and J. E. White, showing the purchaser of their livestock as "R/C Edwards," and an account of sale to consignors W. F. Talley and E. C. Robertson showing the purchaser of their livestock as "Edwards."

(b) On or about December 19, 1945, respondents permitted Robert Ralls, an employee of respondents, to deal in livestock consigned to them for sale on a commission basis. Respondents sold at the stockyards to said employee ten cattle consigned to them for sale on a commission basis by various consignors. Subsequently, respondents resold such ten cattle at the stockyards to "Neuhoff" for the account of said Robert Ralls at a profit of \$23.03 to said employee. Respondents issued accounts of sale to the various consignors showing the purchaser of their livestock as "Edwards."

(c) On or about December 21, 1945, respondents permitted Leon Ralls, an employee of respondents, to deal in livestock consigned to them for sale on a commission basis. Respondents sold at the stockyards to said employee four yearlings consigned to them for sale on a commission basis by J. L. Thomas, Colorado City, Texas. Subsequently, respondents resold the four yearlings at the stockyards to "H. Rosenthal" for the account of said Leon Ralls at a profit of \$8.28 to said employee. Respondents issued an account of sale to said consignor, J. L. Thomas, showing the purchaser of the livestock as "Edwards."

(d) On or about November 22, 1946, respondents permitted Leon Ralls, an employee of respondents, to deal in livestock consigned to them for sale on a commission basis. Respondents sold at the stockyards to said employee one steer consigned to respondents for sale on a commission basis by L. D. Weels; two heifers consigned to them by J. G. Parker; three cattle consigned to them by H. E. Harris; and one heifer consigned to them by J. W. Gates. Subsequently, respond-

ents resold such seven cattle, together with one steer purchased by said Leon Ralls from another market agency at the stockyards, to various buyers for the account of said Leon Ralls at a profit of \$36.22 to said employee. Respondents issued accounts of sale to said consignors, L. D. Weels, J. G. Parker, H. E. Harris, and J. W. Gates, showing the purchaser of their livestock as "R/C Stiles."

(e) Respondents at divers other times during the years 1945 and 1946, permitted Leon Ralls and Robert Ralls, employees of respondents, to deal in livestock consigned to respondents for sale on a commission basis. Respondents sold to such employees livestock consigned to them for sale on a commission basis and, subsequently, resold such livestock at the stockyards for the accounts of the employees at a profit to said employees. Respondents issued accounts of sale to the consignors which showed false or fictitious names as the purchasers of the livestock.

10. On or about January 22, 1947, respondents sold to Hershell Corbin 50 steers consigned to them for sale on a commission basis by E. C. Childers, Decatur, Texas. Respondents resold the said 50 steers to Gib Wright for said Hershell Corbin. Respondents caused the stockyard operator to issue a scale ticket showing Gib Wright, instead of Hershell Corbin, as the purchaser of said steers from E. C. Childers.

11. Copies of the accounts of purchase and accounts of sale on which the seller or purchaser was falsely reported, as set out in the preceding findings of fact, were made a part of the respondents' records, accounts and memoranda.

### CONCLUSIONS

The respondents were registered as and held themselves out as a market agency to buy and sell livestock on a commission basis. The respondents owed their principals undivided loyalty. They were required at all times to be alert to promote their principals' interests and were required to report fully and accurately the details of execution of their principals' orders. They were required to permit no interests which conflicted with the interests of their principals to intervene in the performance of their duty as agents. The respondents were presumably selected as buying and selling agents because of their special knowledge and skill which they were required to bring to bear in executing their principals' orders. They could not, upon receipt of an order for the purchase of livestock, relieve themselves of the responsibility by turning the orders or part of the orders over to a dealer to fill. The dealer should have been a natural competitor to respondents when they bought livestock to fill orders. The foregoing principles of the law of agency, to which a market agency under



the act must adhere, make apparent the violations of the act and the regulations by the respondents.

The turning of orders over to a dealer to fill, as set out in findings of fact No. 3 above, was a failure to render a reasonable buying service in violation of section 304 of the act and was an unfair and deceptive practice in violation of sections 307 and 312 (a) of the act. With respect to each such order, the respondents charged and collected the full buying commission and an additional unauthorized charge which respondents paid to the dealer. This was in violation of section 306 (f) of the act and section 201.24 of the regulations thereunder. The buying rates for the respondents and all other market agencies at the Fort Worth Stock Yards are fixed at levels calculated to return all proper costs of rendering the complete and full buying service, including any cost or expense incident to the employment of a buyer. The respondents by arrangement with the dealer were enabled to pass on to their principals one of the main expenses of rendering a full buying service and collected the full buying commission in addition.

The incorrect reporting to consignors and to purchasers as to the identity of the purchasers or sellers of livestock was a failure to perform properly the accounting part of a reasonable buying service in violation of section 304 of the act and was unfair and deceptive in violation of section 307 and 312 (a) of the act. Section 201.43 of the regulations under the act, which requires true and correct accountings, was not complied with, nor was section 201.59, which regulates the conditions under which consigned livestock may be taken into the market agency's account.

Findings of fact Nos. 6 to 9, inclusive, are illustrations of various ways in which the respondents permitted their personal interests, or the personal interests of their employees, to conflict with the best interests of their principals. The transactions set forth show violations of sections 303, 304, 307 and 312 (a) of the act and sections 201.10, 201.27, 201.43 and 201.60 of the regulations thereunder.

Since copies of the false accounts of purchase and the false accounts of sale rendered by the respondents were made a part of the records and memoranda of the respondents' business, the respondents failed to keep such accounts, records and memoranda as fully and correctly disclose all transactions involved in their business. This was in violation of section 401 of the act and also was in violation of section 10 of the so-called Federal Trade Commission Act which section is incorporated in and made a part of the Packers and Stockyards Act by virtue of section 402 of the latter act.

The order of inquiry alleges that the violations on the part of the respondents were wilful but the respondents deny any wilful violations. The explanation made of some of the transactions by the respondents tends to negative any wilfulness. Inasmuch as this is the first disciplinary proceeding against the respondents under the act and inasmuch as the respondents claim that they have not engaged in any of the practices complained of since being informed that the practices were considered to be violations of the act, it is believed that a suspension of respondent's registration should not be ordered. The respondents should, however, be ordered to cease and desist from continuing to violate the act and the regulations.

### ORDER

The respondents shall cease and desist from :

- (1) Failing to render reasonable selling and buying services,
- (2) Engaging in unfair and deceptive practices,
- (3) Assessing and charging any rate or charge for the purchase or sale of livestock on a commission basis other than the rates and charges set out in respondents' tariffs on file with the Secretary of Agriculture pursuant to the act,
- (4) Failing to keep such accounts, records and memoranda as fully and correctly disclose all transactions in respondents' business,
- (5) Causing false copies of accounts of purchase and accounts of sale to be made a part of the accounts, records and memoranda of the respondents' business,
- (6) Purchasing livestock out of consignments for sale on a commission basis, except as permitted by the regulations,
- (7) Permitting their employees to deal in consigned livestock, and
- (8) Selling livestock, acquired by the respondents' employees on a dealer basis, in competition with livestock consigned to respondents for sale for the accounts of shippers on a commission basis.

A copy of this order shall be served upon each respondent and shall become effective five days after such service.

(No. 2412)

*In re* EDWARD WHISENANT, D. B. A. THE LONE STAR LIVESTOCK COMMISSION COMPANY. P&S Doc. No. 1871. Decided April 12, 1950.

### Cease and Desist—Violations of Act

Where the order of inquiry charged respondent with wilful violations of various provisions of the act and the respondent, in his answer, admitted such violations but denied wilfulness in connection therewith and consented to a cease and desist order, which was recommended by the Livestock Branch, the re-

respondent is ordered to cease and desist from failing to report on accounts of sale the correct names of purchasers of consigned livestock sold by the respondent on a commission basis; failing to report on accounts of purchase the correct names of the sellers of livestock purchased by the respondent on a commission basis; failing to report to consignors and to purchasers that consignors' livestock was used by respondent to fill orders handled for the purchasers by the respondent on a commission basis; failing to render reasonable and just selling services; engaging in unfair and deceptive practices; selling, in competition with livestock consigned to respondent for sale on a commission basis, livestock bought by his employees or by respondent on a dealer basis; making or causing to be made false entries in respondent's accounts, records and memoranda; selling consigned livestock to his employees or to partnerships in which his employees are partners; taking consigned livestock into the account of respondent market agency, except in compliance with the regulations; and operating as a dealer without being registered and bonded as required by the act and the regulations.\*

*Mr. Jerome S. Ducrest* for complainant. *Mr. Edward Whisenant*, of Fort Worth, Texas, for respondent.

*Decision by Thomas J. Flavin, Judicial Officer*

#### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 181 *et seq.*), hereinafter referred to as the act. The order of inquiry and notice of hearing, filed February 10, 1950, alleges that respondent wilfully violated several different provisions of the act and the regulations thereunder. The respondent filed an answer on March 2, 1950, in which he explained generally his method of operating as a market agency and explained how some of the transactions referred to in the order of inquiry happened. On March 28, 1950, he filed a supplemental answer in which he admitted the facts alleged, denied that he wilfully violated the act or the regulations, and consented to the entry of a cease and desist order.

#### FINDINGS OF FACT

1. The Fort Worth Stock Yards, Fort Worth, Texas, hereinafter referred to as the stockyards, at all times mentioned herein was a posted stockyard subject to the provisions of the act.

2. At all times mentioned herein, respondent was registered with the Secretary of Agriculture as a market agency to buy and sell livestock on a commission basis at the stockyards.

3. On or about the dates and in connection with the transactions set out in the table below and at divers other times in connection with

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

divers other transactions during the years 1946 and 1947, the respondent, at the stockyards, sold livestock consigned to him for sale on a commission basis to certain of his employees and, in connection with such sales, submitted to the consignors of the livestock accounts of sale which showed false or fictitious names as the purchasers of livestock.

Date of sale	Consignor	Number and species of livestock	Employee to whom sold	Name of person shown on account of sale
<b>1946</b>				
Mar. 5 .....	J. K. Carney .....	1 hog .....	Frank Helm .....	KT-M.
Aug. 2 .....	do .....	do .....	do .....	LS-(H).
Sept. 24 .....	Louis Carlton .....	1 calf .....	Fred Porterfield .....	Watkins.
Oct. 7 .....	Gene Cook .....	1 cow .....	do .....	Do.
Oct. 10 .....	R. W. Howard .....	2 yearlings .....	do .....	Do.
Oct. 29 .....	A. F. Bagley .....	1 cow .....	do .....	Do.
Oct. 31 .....	H. S. Halbrooks .....	1 heifer .....	do .....	LS-Watkins.
Dec. 13 .....	R. O. Bogue .....	1 steer .....	do .....	Do.
<b>1947</b>				
Aug. 7 .....	W. C. Fulbright .....	1 calf .....	do .....	LS-P.
Sept. 11 .....	do .....	1 yearling .....	Verdett Porterfield .....	Wills.
Sept. 23 .....	Jas. N. Howell .....	1 calf .....	Fred Porterfield .....	LS-P.
Oct. 1 .....	John Burns .....	do .....	do .....	Fuschshuber.
Oct. 1 .....	W. C. Fulbright .....	6 calves .....	do .....	Do.
Oct. 6 .....	Elia Warren .....	1 calf .....	do .....	LS-P.
Oct. 15 .....	H. L. Bullard .....	do .....	Verdett Porterfield .....	LS-P.
Oct. 30 .....	JBL Hancock .....	do .....	Fred Porterfield .....	LS-P.

4. On or about the dates and in connection with the transactions set out in the table below and at divers other times in connection with divers other transactions during 1945 and 1947, the respondent, at the stockyards, sold livestock consigned to him for sale on a commission basis to a partnership composed of Frank Helm, an employee of respondent, and Louie Mitchell and, in connection with such sales, submitted to the consignors of the livestock accounts of sale which failed to show the full, true and correct names of the purchasers of their livestock.

Date of sale	Consignor	Number and species of livestock	Name of person shown on account of sale
Nov. 23, 1945 .....	P. C. Caldwell III .....	1 hog .....	KT (Mit).
Feb. 21, 1947 .....	Ruby P. Chadwick .....	do .....	Nored-H.
Sept. 5, 1947 .....	W. C. Fulbright .....	2 calves, 3 cows .....	M & H.

5. On or about the dates and in connection with the transactions set out in the table below and at divers other times in connection with divers other transactions during the years 1945 to 1947, inclusive, the respondent, at the stockyards, resold livestock purchased by certain of his employees at the stockyards in dealer transactions in competition with livestock consigned to him for sale on a commission basis by various consignors:

Date of resale	Number and species of livestock	Employee for whom livestock resold	Buyer to whom sold
<b>1945</b>			
Oct. 8.....	1 cow.....	Frank Helm.....	Swift.
Oct. 22.....	1 calf.....	do.....	Peters.
<b>1946</b>			
Feb. 14.....	1 hog.....	do.....	Rose City.
Feb. 22.....	1 cow.....	Fred Porterfield.....	Alliston.
	do.....	do.....	Pitner.
Feb. 27.....	2 hogs.....	Frank Helm.....	City.
Mar. 5.....	do.....	do.....	Do.
Mar. 6.....	1 hog.....	do.....	A & Co.
Apr. 18.....	do.....	do.....	T. B. S.
Apr. 22.....	2 hogs.....	do.....	Swift.
May 7.....	1 hog.....	do.....	Prison.
May 14.....	do.....	do.....	Swift.
May 21.....	1 cow.....	Fred Porterfield.....	Pedigo.
May 28.....	1 hog.....	Frank Helm.....	City.
June 3.....	do.....	do.....	Do.
June 10.....	2 hogs.....	do.....	Do.
June 18.....	do.....	do.....	Do.
June 20.....	1 hog.....	do.....	Do.
July 3.....	2 cows.....	Fred Porterfield.....	Rogers.
July 15.....	1 hog.....	Frank Helm.....	TBS-Elkins.
July 17.....	2 hogs.....	do.....	Swift.
July 22.....	1 hog.....	do.....	Boring.
July 25.....	1 cow.....	Fred Porterfield.....	Swift.
Aug. 7.....	1 hog.....	Frank Helm.....	Do.
Aug. 8.....	do.....	do.....	A & Co.
Oct. 11.....	2 yearlings.....	Fred Porterfield.....	Brook.
Nov. 1.....	1 heifer.....	do.....	Whalley.
Dec. 16.....	1 yearling.....	do.....	Rogers.
Dec. 23.....	3 yearlings.....	do.....	Armour.
	1 yearling.....	do.....	Kelley.
<b>1947</b>			
May 23.....	2 heifers.....	do.....	K&S-S.
May 28.....	1 yearling.....	do.....	Sullivan.
May 29.....	3 yearlings.....	do.....	Do.
June 9.....	1 heifer.....	do.....	Prater.
June 23.....	1 hog.....	Frank Helm.....	Southern.
Aug. 4.....	3 calves.....	Fred Porterfield.....	M. Farmer.
Aug. 5.....	1 yearling.....	do.....	A & Co.
Aug. 8.....	1 calf.....	do.....	Noble.
Aug. 11.....	1 hog.....	Frank Helm.....	A & Co.
Aug. 25.....	do.....	do.....	Swift.
Oct. 2.....	7 calves.....	Fred Porterfield.....	Fuchshuber (L. S.).
Oct. 8.....	1 calf.....	do.....	Roach.
Oct. 31.....	do.....	do.....	P. Weaver.

6. On or about the dates and in connection with the transactions set out in the table below and at divers other times in connection with divers other transactions during the year 1945, the respondent, at the stockyards, used livestock consigned to him for sale on a commission basis to fill orders on a commission basis for Oscar Fuchshuber and for various other persons and, in accounting to the consignors of the livestock so used, failed fully and correctly to disclose the fact that the livestock was sold to purchasers for whom the respondent was filling orders on a commission basis and, in accounting to the purchasers, failed fully and correctly to disclose to such purchasers that the livestock was purchased out of consignments received by the respondent for sale on a commission basis.

Date on account of sale	Number and species of livestock	Consignor	Name of purchaser shown on account of sale	Name of seller shown on account of purchase	Date on account of purchase
<b>1945</b>					<b>1945</b>
Nov. 2.....	1 cow.....	W. W. Ross.....	Fitchnrbert.....	LS	Nov. 9
Nov. 5.....	1 calf.....	W. K. Gauden.....	Lone Star.....	LS	Do.
Nov. 12.....	1 yearling.....	A. H. Shackey.....	Fuchubert.....	LS	Nov. 16
Nov. 15.....	1 calf.....	Ethel Mason.....	Futchburt.....	LS	Do.
	3 yearlings.....	H. D. Mason.....	Futchber.....	LS	Do.

7. On or about the dates and in connection with the transactions set out in the table below and at divers other times in connection with divers other transactions during the years 1946 and 1947, the respondent engaged in dealer transactions at the stockyards without being registered with the Secretary of Agriculture as a dealer and without having furnished bond in connection therewith, and on the dates set out in the table below and in connection with such dealer transactions the respondent purchased livestock and later resold such livestock, under false or fictitious names, in competition with livestock consigned to him for sale on a commission basis.

Date of purchase	Agency from which purchased	Number and species of livestock	Date of resale	Name under which resold
<b>1946</b>			<b>1946</b>	
Aug. 28.....	Keen and Sons Livestock Commission Co.	16 calves.....	Aug. 29	Howell.
Oct. 30.....	Texas Livestock Marketing Association.	43 cattle.....	Oct. 31	Do.
<b>1947</b>			<b>1947</b>	
May 21.....	Daggett-Keen.....	15 cattle.....	May 22	LS-Howell.
Do.....	Nored-Hutchens.....	19 cattle.....	do.....	Do.
May 20.....	Texas Livestock Marketing Association.	14 cattle.....	May 21	Lone Star-Howell.
May 15.....	do.....	1 yearling.....	May 16	LS-H.
Do.....	do.....	3 cattle.....	May 19	Lone Star-H.
June 25.....	do.....	14 cattle.....	June 25	Howell.
June 24.....	do.....	2 helpers.....	June 24	LS-Howell.

8. (a) Respondent, at the stockyards, during the period from November 6, 1945, through October 30, 1947, on more than 240 occasions during that period sold livestock for Fred Porterfield, an employee of respondent, to various purchasers in competition with livestock consigned to respondent for sale on a commission basis.

(b) Respondent, at the stockyards, during the months of October and November 1945, and during the period from September 16, 1946, through October 20, 1947, consistently sold livestock for a partnership composed of Frank Helm, an employee of respondent, and Louie Mitchell in competition with livestock consigned to respondent for sale on a commission basis. Respondent engaged in three or more such sales transactions for the partnership during every month of said period.

9. (a) On or about May 3, 1947, respondent, at the stockyards, purchased for his own account 24 cattle consigned to him for sale on a commission basis by L. E. Bays and, in accounting to the consignor of the livestock, failed to show on the account of sale as the purchaser of the livestock the full, true and correct name of respondent. Respondent rendered to the consignor an account of sale showing "LS-Howell" as the purchaser of 23 of such cattle and "Matthews" as the purchaser of the remaining one head. The 24 cattle were resold by respondent, at the stockyards, on or about May 5, 1947, in competition with livestock consigned to respondent for sale on a commission basis, at a profit of \$139.10 to respondent.

(b) On or about July 24, 1947, respondent, at the stockyards, purchased for his own account one yearling consigned to him for sale on a commission basis by Viola Powell and two yearlings consigned to him for sale by J. C. Powell. In accounting to the consignors of the livestock, respondent failed to show on the accounts of sale as the purchaser of the livestock his full, true and correct name. Respondent rendered to said Viola Powell an account of sale showing "Hale" as the purchaser of her yearling and to said J. C. Powell an account of sale showing "Hale—LS" as the purchaser of his two yearlings. The three yearlings were resold by the respondent, at the stockyards, on or about July 28, 1947, in competition with livestock consigned to respondent for sale on a commission basis, at a profit to respondent.

(c) At divers other times during the year 1947, respondent, at the stockyards, purchased livestock consigned to him for sale on a commission basis for his own account and, in accounting to the consignors of the livestock, failed to show on the accounts of sale as the purchaser of the livestock the full, true and correct name of respondent. Respondent rendered to the consignors accounts of sale showing false or fictitious names as the purchasers of the livestock. Respondent subsequently resold such livestock, at the stockyards, in competition with livestock consigned to him for sale on a commission basis.

10. (a) On or about May 26, 1947, respondent engaged in a dealer transaction at the stockyards, through a trading partnership composed of respondent and J. D. Hale, without being registered with the Secretary as a dealer and without having furnished bond. The partnership purchased through said J. D. Hale 19 yearlings in a country transaction financed by respondent. The yearlings were sold by respondent, at the stockyards, on or about May 26, 1947, to "Columbia" and "Armour" in competition with livestock consigned to respondent for sale on a commission basis, and the profit from such sale was divided between respondent and J. D. Hale.

(b) On or about June 16, 1947, respondent engaged in a dealer transaction at the stockyards, through a trading partnership composed of respondent and J. D. Hale, without being registered with the Secretary as a dealer and without having furnished bond. The partnership purchased on or about June 14, 1947, through said J. D. Hale, 11 cows and 10 calves in a country transaction financed by respondent. The cattle were sold by respondent, at the stockyards, on or about June 16, 1947, to Dallas Vann, a registered dealer, in competition with livestock consigned to respondent for sale on a commission basis, and the profit from such sale was divided between respondent and J. D. Hale.

(c) On or about August 6, 1947, respondent engaged in a dealer transaction at the stockyards, through a trading partnership composed of respondent and J. D. Hale, without being registered with the Secretary as a dealer and without having furnished bond. The partnership purchased on or about August 5, 1947, through said J. D. Hale, 16 cattle from the Abilene Livestock Auction Commission, Abilene, Texas, a posted stockyard, in a transaction financed by respondent. The 16 cattle were sold by respondent at the stockyards on or about August 6, 1947, to various purchasers in competition with livestock consigned to respondent for sale on a commission basis, and the profit from such sale was divided between respondent and J. D. Hale.

(d) At divers other times during the year 1947, respondent engaged in dealer transactions at the stockyards, through a trading partnership composed of respondent and J. D. Hale, without being registered with the Secretary as a dealer and without having furnished bond. The partnership purchased livestock through said J. D. Hale in country transactions and transactions at other posted stockyards financed by respondent. Livestock so purchased was sold by respondent at the stockyards in competition with livestock consigned to respondent for sale on a commission basis, and the profits from such sales were divided between respondent and J. D. Hale.

11. Copies of the false accounts of purchase and sale referred to in findings of fact Nos. 3, 4, 7 and 9 above, formed a part of the accounts, records and memoranda of the respondent's business.

### CONCLUSIONS

The respondent was registered as and held himself out as a market agency to buy and sell livestock on a commission basis. He, as agent for those for whom he bought and sold livestock, owed the duty of undivided loyalty. He was required at all times to be alert to promote his principals' interests and was required to report fully and accurately the details of execution of his principals' order. He was



required to permit no conflicting interests on his part, or on the part of his employees, to intervene in the performance of his duties as an agent. The foregoing principles of the law of agency, to which a market agency under the act must adhere, make apparent that the transactions set out in the findings of fact constitute violations of the act and the regulations thereunder.

Frank Helm and Fred Porterfield were employed salesmen of the respondent sellings hogs and cattle, respectively. Livestock consigned to the respondent, as set out in finding of fact No. 3, were bought by these two employees, whose personal interests in the transactions necessarily conflicted with the interest of the respondent's principals. The respondent did not report that his employees had purchased the livestock but showed false or fictitious names as the names of the purchasers. The false accountings were a violation of section 201.43 of the regulations. But even had the accountings been in all respects true and correct, the purchase of the consigned livestock by respondent's employees was a violation of section 201.60 of the regulations, which absolutely prohibits an employee of a market agency from buying consigned livestock. In permitting a conflicting interest on the part of his employees to intervene in the performance of the agency, the respondent failed to render a reasonable selling service in violation of section 304 of the act. The respondent, by permitting consigned livestock to be purchased by his employees, whose duty it was to sell the livestock, engaged in an unfair and deceptive practice in violation of sections 307 and 312 (a) of the act and this unfair practice was concealed by the false accountings. The foregoing conclusions are also applicable to finding of fact No. 4.

Findings of fact Nos. 5, 7, 8, 9 and 10 are illustrations of other ways in which the respondent permitted his personal interests, or the personal interests of his employees, to conflict with the principals' interests in the performance of the agency. For the reasons outlined above, those facts show that sections 304, 307 and 312 (a) of the act were violated.

Section 201.62 of the regulations rigidly prescribes the conditions under which consigned livestock may be used by the consignee to fill orders held by the consignee. Finding of fact No. 6 shows that the requirements of that regulation were not observed.

Operating as a dealer without being registered and bonded either individually, as set out in finding of fact No. 7, or in partnership with others, as set out in finding of fact No. 10, was a violation of section 303 of the act and of sections 201.10 and 201.27 of the regulations thereunder.

In addition to what has been said by way of conclusion with respect to finding of fact No. 9, it appears that the facts stated therein show improper accountings to principals in violation of sections 201.43 and 201.57 of the regulations under the act.

Inasmuch as copies of the false accounts of purchase or sale referred to in findings of fact Nos. 3, 4, 7 and 9 formed a part of the accounts, records and memoranda pertaining to the respondent's business at the stockyards, section 10 of the so-called Federal Trade Commission Act was also violated.

The order of inquiry alleges that the violations therein set forth were wilfully committed. The explanation made by respondent of some of the transactions tends to negative wilfulness. Moreover, the respondent claims that local representatives of the Packers and Stockyards Division in the past have been aware of what respondent was doing and how he was operating but never advised him that his actions and operations were contrary to the act and the regulations. In view of the foregoing facts and claims and inasmuch as this is the first disciplinary proceeding against the respondent, it is believed that a suspension of respondent's registration should not be ordered. The respondent should, however, be ordered to cease and desist from continuing to violate the act and the regulations.

#### ORDER

The respondent shall cease and desist from:

- (1) Failing to report on accounts of sale the correct names of purchasers of consigned livestock sold by the respondent on a commission basis.
- (2) Failing to report on accounts of purchase the correct names of the sellers of livestock purchased by the respondent on a commission basis.
- (3) Failing to report to consignors and to purchasers that consignors' livestock was used by the respondent to fill orders handled for the purchasers by the respondent on a commission basis.
- (4) Failing to render reasonable and just selling services.
- (5) Engaging in unfair and deceptive practices.
- (6) Selling in competition with livestock consigned to the respondent for sale on a commission basis livestock bought by his employees as dealers or purchased by the respondent on a dealer basis.
- (7) Making or causing to be made false entries in respondent's accounts, records and memoranda.
- (8) Selling consigned livestock to his employees or to partnerships in which his employees are partners.

(9) Taking consigned livestock into the account of respondent market agency, except in compliance with the regulations pertaining thereto.

(10) Operating as a dealer without being registered and bonded as required by the act and the regulations.

A copy of this order shall be served upon respondent and it shall become effective five days after service.

(No. 2413)

*In re* ROBERT H. DRAKE AND HARLEY R. DRAKE. P&S Doc. No. 1863.  
Decided April 26, 1950.

#### **Suspension of Registration**

Respondents' registration suspended for violations of section 305, 312 (a) and 402 of the act but suspension not to be effective unless respondents are found to have violated the act again within two years.

#### **Cease and Desist—Violation of Act**

Respondents are ordered to cease and desist from practices complained of and directed specifically to keep certain records.

*Mr. John J. Murray* for complainant. *Mr. Robert Hollowell, Jr., of Kane, Blain & Hollowell*, Indianapolis, Indiana, for respondents.

*Decision by Thomas J. Flavin, Judicial Officer*

#### **PRELIMINARY STATEMENT**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to as the act.

On December 23, 1949, respondents were served with a copy of an Order of Inquiry and Notice of Hearing charging them with violations of the act. On January 12, 1950, Robert Hollowell of the firm of Kane, Blain and Hollowell, respondents' attorneys, filed an answer admitting most of the allegations of the Order of Inquiry and Notice of Hearing. Subsequently on March 31, 1950, respondents filed an "Answer" amending the previous answer. By the amended answer respondents admitted all of the facts alleged in the Order of Inquiry and Notice of Hearing, waived their rights to an oral hearing, and consented to the entry of such an order as the Judicial Officer might deem appropriate. In addition, the answer stated that "Respondents will refund to their consignors the sum of \$1,907.83 covering overcharges on feed during the period of 30 months by a reduction of 10%

in the charges made against consignors for feed furnished their livestock until such time as the total amount of \$1,907.88 has been refunded."

On April 17, 1950, counsel for the Livestock Branch filed a Recommendation with respect to the type of order to be issued.

### FINDINGS OF FACT

1. At all times mentioned herein the Indianapolis Stock Yards, Indianapolis, Indiana, hereinafter referred to as the stockyard, was a posted stockyard subject to the provisions of the act.

2. The respondents are partners who have registered with the Secretary of Agriculture as a market agency to buy and sell livestock on a commission basis at the stockyard and at the times mentioned herein engaged in the business for which they registered at the stockyard.

3. The respondents wilfully made or caused to be made entries in their annual report submitted to the Secretary of Agriculture for the calendar year 1947 showing (1) that gross proceeds were \$3,013,573.19, whereas the gross proceeds were \$4,310,142.78 and (2) that selling commissions were \$20,263.15, whereas selling commissions were \$21,905.21.

4. The respondents wilfully made or caused to be made entries in their annual report submitted to the Secretary of Agriculture for the calendar year 1948 showing (1) that gross proceeds were \$3,009,122.48, whereas gross proceeds were \$4,677,398.54, (2) that selling commissions were \$23,704.29, whereas selling commissions were \$24,758.33, and (3) net profit was \$7,478.03, whereas net profit was \$9,103.88.

5. The respondents charged their consignors \$5,317.71 for feed during 1947 but only supplied feed costing \$4,292.32.

6. The respondents charged their consignors \$3,829.92 for feed during 1948 but only supplied feed costing \$3,247.24.

7. During 1947 and 1948 the respondents did not keep (1) a general ledger containing accounts showing income, expenses, fixed assets, and capital invested in the business, (2) a cash book showing in detail all cash received and disbursed, (3) periodic recapitulations of accounts of sale, and (4) monthly reconciliations of their bank account.

### CONCLUSIONS

In view of the facts found herein it is clear that respondents have violated sections 305, 312 (a), 401, and 402 of the act. Such violations are serious and warrant suspension of respondents' registration. However, the respondents are going to make restitution. In addition, the Livestock Branch, the administrative agency responsible for administration of the act, has recommended less severe action. The

recommendation of the Livestock Branch will be followed with respect to the order.

### ORDER

1. Respondents will cease and desist from charging consignors unreasonable or unjust rates for feed.

2. Respondents' registration as a market agency at the Indianapolis Stock Yards is suspended for a period of 10 days.

3. Respondents shall keep (1) a general ledger containing accounts showing income, expenses, fixed assets, and capital invested in the business, (2) a cash book showing in detail all cash received and disbursed, (3) periodic recapitulations of accounts of sale, and (4) monthly reconciliations of their bank account.

4. Except as to service and as to suspension of respondents' registration this order shall become effective on the sixth day following its date of execution. The suspension of respondents' registration shall not become effective unless respondents are found to have violated the act within two years after the effective date of this order.

(No. 2414)

*In re* W. K. LEONARD, H. T. WILLIAMS AND RICHARD J. SPALDING,  
D. B. A. LEONARD, WILLIAMS AND SPALDING. P&S Doc. No. 1814.  
Decided April 26, 1950.

### Cease and Desist—Violations of Act

Respondents ordered to cease and desist from indicating on billings or copies of scale tickets, in selling as a dealer that any person other than themselves is the owner of livestock sold, and directed to keep accounts, records and memorandum as will fully disclose all transactions involved in their business.\*

*Mr. John J. Murray* for complainant. *Mr. Chas. I. Dawson*, of Louisville, Kentucky, for respondents. *Mr. John J. Curry*, Hearing Examiner.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), in which the order of inquiry and notice of hearing, charging unfair and deceptive practices and the failure to keep accurate books and records in violation of sections 307, 312, 401 and 402 of the act (7 U. S. C. 208, 213, 221, 222) and the regulations issued pursuant thereto, was issued August 4, 1948,

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

against the respondents W. K. Leonard, H. T. Williams and Richard J. Spalding, doing business as Leonard, Williams and Spalding, registered under the act as a market agency and dealer at the Bourbon Stockyards, Louisville, Kentucky. The respondents filed an answer to the complaint and requested an oral hearing.

An oral hearing was held on February 19, 1949, at Louisville, Kentucky, before John J. Curry, Office of Hearing Examiners, United States Department of Agriculture. John J. Murray, Office of the Solicitor, United States Department of Agriculture, appeared for the Livestock Branch and Judge Charles I. Dawson, Louisville, Kentucky, appeared for the respondents. After the hearing, the parties filed briefs, suggested findings, etc.

The charges against respondents involve a purchase of 25 heifers by A. W. Wells, Bardstown, Kentucky, from the respondents. As amended at the hearing, the order of inquiry alleges (1) that respondents' billing of Wells for the purchase of the 25 heifers indicated that the heifers had been purchased from "Lackie" for the account of Wells, whereas respondents owned the heifers, (2) that respondents altered the scale ticket covering the heifers to show 25 heifers totalling 11,130 pounds, whereas 26 animals were weighed totally 11,130 pounds, (3) that respondents "misrepresented to the Kentucky Department of Agriculture the sex and purpose of removal of the heifers from the stockyard to A. W. Wells without the inspection for contagious or infectious diseases required by State law in connection with breeding stock," and (4) that respondents placed a copy of the false scale ticket in their records thereby keeping records that do not fully and correctly disclose all transactions involved in their business.

In his report, the examiner concluded (1) that the use of the name "Lackie" on the billing, that is the scale ticket which was part of the billing, was not proper, (2) that the evidence does not establish alteration of the scale ticket by substituting "25" for "26," and (3) that respondents engaged in an unfair and deceptive practice in violation of section 312 of the act by failing to have the heifers "Bangs-disease tested" before they were removed from the stockyard. As a result of the conclusion that the charge of altering the scale ticket was not established, of course the charge of fake records also was disregarded by the examiner. The examiner recommended a cease and desist order in connection with the violations found by him. Respondents filed exceptions to the report but the complainant did not do so. No request for oral argument was made.

We agree with the examiner's recommendation for dismissal of the charges involving the alteration of the scale ticket for the reasons

given by him in his report. The stockyard company's original and one copy of the scale ticket show "26" animals whereas respondents' copy and the copy given Wells show "25." This is some indication of alteration and cheating but the evidence at the hearing as to what happened in connection with the weighing of the animals is hopelessly confusing and conflicting. The complainant did not except to the examiner's conclusion that the evidence did not sustain the charge of alteration by respondents.

We find it necessary to disagree with the examiner's conclusion that respondents violated section 312 by failing to have the animals tested for contagious or infectious diseases before the animals left the stockyard. There is no citation of any applicable State or Federal law or regulation given in the proceeding. The evidence shows that there is a cooperative understanding between the Bureau of Animal Industry of the United States Department of Agriculture and the State of Kentucky that animals arriving at the stockyard are given visual inspection, that the stockyard company cooperates with respect to livestock leaving the stockyard by requiring a certificate from the appropriate livestock inspector. As to livestock not being moved out of the State of Kentucky, the certificate is issued by the Kentucky Department of Agriculture, Division of Livestock Sanitation. However, the inspector who signed this certificate in evidence in this case for this State agency is a Bureau of Animal Industry inspector, United States Department of Agriculture, pursuant to the cooperative understanding. This inspector, Dr. J. T. Blaser, testified that it is not the practice or the custom to require Bang's disease tests or other instrument tests in connection with *beef* breeder stock, as distinguished from dairy-type or dairy-breeding stock, leaving the stockyard for use in Kentucky. Such tests in such cases are made only upon request. The heifers involved here were for beef breeding purposes and were not a dairy-type group. The evidence, then, does not show, as charged in the order of inquiry, that the State law was evaded by respondents in not having Bang's disease tests made at the stockyard. It is puzzling as to why the sanitation certificate in this case describes the heifers as steers for feeding, but respondents claim there must have been a misunderstanding. At any rate, in view of Dr. Blaser's testimony, in the absence of any clear-cut picture as to what the requirements of State law are, and without any legal basis advanced in the proceeding as to why respondents should have had the livestock Bang's-disease tested at the stockyard or be in violation of the Packers and Stockyards Act, 1921, we must conclude that the charge in the complaint on this score was not sustained in the proceeding.

### FINDINGS OF FACT

1. At all times pertinent herein, the Bourbon Stockyards, Louisville, Kentucky, was posted as subject to the provisions of the Packers and Stockyards Act, 1921.

2. The respondents, W. K. Leonard, H. T. Williams and Richard J. Spalding, are partners, doing business as Leonard, Williams and Spalding, and are registered under the act as a market agency to buy and sell livestock on a commission basis, to render clearing services, and to operate as a dealer, all with respect to the Bourbon Stockyards.

3. On March 10, 1947, at the Bourbon Stockyards, respondents weighed certain livestock to A. W. Wells, Bardstown, Kentucky, and billed him for 25 heifers, totalling 11,130 pounds, at \$15.75 per hundredweight. The billing consisted in part of a copy of a scale ticket which indicated that the heifers had been purchased from "Lackie" for the account of "A. W. Wells", whereas the heifers belonged to respondents.

### CONCLUSIONS

We have concluded above, for the reasons there given, that the charges as to alteration of the scale ticket by respondents, the keeping of a copy of a false scale ticket, namely an altered scale ticket, in respondents' records, and violation of the act through misrepresentation as to the sex and purpose of the heifers thus evading inspection under State law, should be dismissed. There is left the charge of issuing a billing indicating a purchase from "Lackie" for the account of "A. W. Wells" when respondents owned the heifers and the charge that keeping a copy of this scale ticket in respondents' records was not the keeping of records which fully and correctly disclosed all transactions involved in respondents' business.

On its face, the scale ticket does indicate that respondents purchased the livestock from "Lackie" for the account of A. W. Wells. Respondents are registered to operate both as a commission firm and a dealer. While there are some circumstances surrounding the transaction that are not at all clear, no commission charges for the transaction were made and it appears that the heifers were part of a purchase by respondents from the Cassidy Commission Company, Oklahoma City, Oklahoma. Where a firm engages in both commission and dealer transactions, it is essential that the nature of the transaction be specifically shown. A billing or scale ticket carrying a name other than the selling dealer in a dealer transaction is confusing and misleading. If for his own purposes, a dealer wants to identify a particular lot sold by its sources, he can do so on his own records rather



than on the billing sent to the purchaser, at least in the way it was done here indicating a seller to A. W. Wells other than the real seller, the respondents. We think sections 307 and 312 were violated and that respondents should be ordered to cease and desist from so billing purchasers in dealer transactions. On a somewhat technical basis, retention of the copy of the scale ticket in respondents' records was also irregular, and respondents should be ordered, under section 401 of the act, to keep such records as will fully and correctly reflect all transactions involved in their business.

### ORDER

The respondents shall cease and desist from indicating on billings, or copies of scale tickets, in selling livestock as a dealer that any person other than themselves is the owner of the livestock sold.

The respondents shall keep such records, accounts and memoranda as will fully and correctly disclose all transactions involved in their business.

(No. 2415)

GEORGE F. JOSEPH *v.* L. D. ROBINSON Co. PACA Doc. No. 5297.  
Decided April 3, 1950.

#### Failure to Pay Balance of Purchase Price—Default

Where complainant alleged that he sold four truckloads of apples to respondent but that respondent failed to pay the full purchase price and where respondent failed to file an answer to the formal complaint, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, and respondent's failure to pay the full purchase price is in violation of section 2 of the act for which complainant is entitled to an award of reparation in the amount of the unpaid balance of the purchase price.\*

*Mr. George F. Joseph, of Yakima, Washington, complainant pro se. Mr. E. D. Mulville, Presiding Officer.*

*Decision by Thomas J. Flavin, Judicial Officer*

#### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Informal complaint was received December 16, 1949. A formal complaint was filed January 23, 1950, alleging that in November 1949

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

complainant sold to respondent four truckloads of apples for \$5,777.52 but that respondent paid complainant only \$3,407.46, leaving an unpaid balance of \$2,370.06. Copies of the Fruit and Vegetable Branch's report of investigation were served on the complainant February 20, 1950, and on the respondent February 21, 1950. A copy of the formal complaint was also served on the respondent February 21, 1950.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint and a waiver of oral hearing. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

#### FINDINGS OF FACT

1. Complainant is an individual, George F. Joseph, whose address is Box 1584, Yakima, Washington.

2. Respondent, L. D. Robinson Co., is a partnership composed of LeRoy D. Robinson and Joseph J. Crosetti, whose address is 510 Battery Street, San Francisco 11, California. At the time of the transactions complained of herein, respondent was licensed under the act.

3. On or about November 10, 11, 14 and 21, 1949, complainant sold to the respondent 4 truckloads of Combination Extra Fancy and Fancy Winesap Apples, each load consisting of 798 boxes, sizes 234's and 252's, at an agreed price of \$1.81 per box, f. o. b. shipping point, or a total sales price of \$5,777.52.

4. On or about November 19, 21 and December 7, 1949, complainant shipped by truck, in interstate commerce, from the State of Washington to destinations specified by respondent in San Francisco, California, 3,192 boxes of apples which complied with the contracts.

5. Upon arrival of the shipments at destination respondent accepted the apples as being in compliance with the contracts but has since paid complainant only \$3,407.46, leaving a balance due of \$2,370.06.

6. Formal complaint was filed within 9 months after the causes of action accrued.

#### CONCLUSIONS

Failure of respondent to file an answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, as provided in the rules of practice (7 CFR 47.8 (c)). The facts thus admitted are that the complainant sold 4 truckloads of apples to the respondent for a total sales price of \$5,777.52; that apples meeting contract requirements were shipped in interstate commerce to destinations specified by respondent and accepted by respondent; and that

respondent paid complainant \$3,407.46, leaving an unpaid balance of \$2,370.06, no part of which has been paid.

It appears from the record that the respondent does not question its obligation to complainant for the full amount claimed, and that failure to pay has been due to respondent's financial difficulties.

Respondent's failure to pay the full agreed purchase price is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of the unpaid balance of \$2,370.06, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$2,370.06, with interest thereon at the rate of 5 percent per annum from January 1, 1950, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2416)

PACA Doc. No. 5191.\* Decided April 3, 1950.

### Dismissal—Settlement Between Parties

Where the Department was notified that the parties have reached an amicable settlement of the controversy, and dismissal of the proceeding was requested, the complaint is dismissed.

*Mr. R. W. Gudgeon and Mr. LeRoy W. Gudgeon, of Chicago, Illinois, for complainant. Messrs. Golbus & Goldbus, of Chicago, Illinois, for respondent. Mrs. Ilene M. Crigler, Presiding Officer.*

*Decision by Thomas J. Flavin, Judicial Officer*

### ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C., 1946 ed., 499a *et seq.*). A formal complaint was filed on August 2, 1949 for the recovery of \$1,719.23, which is alleged to be the difference between the contract price of two carloads of lettuce sold and delivered to respondent by complainant, and the net proceeds remitted by respondent upon its resale of the shipments. Complainant requested an oral hearing. On October 17, 1949 respondent filed an answer to the complaint denying

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\*As explained in Prefatory Note, the identities of the parties are not disclosed.—Ed.

liability. A supplemental report of investigation was prepared by the Regulatory Division and served by registered mail upon the parties on January 11, 1950.

By letter dated March 17, 1950, complainant's representative advised the Department that the parties had arrived at an amicable settlement of the controversy, and that complainant had received payment from respondent of the amount agreed upon. Dismissal of the proceeding was requested. Accordingly, the complaint is hereby dismissed.

Copies hereof shall be served upon the parties.

(No. 2417)

N. R. PEET & SON, INC. v. ROCKLAND COUNTY FRUIT FARMS, INC.  
PACA Doc. No. 5106. Decided April 4, 1950.

**Failure to Pay Purchase Price—Rejection Without Reasonable Cause—Effect of Failure of Respondent to Take Delivery at Agreed Time—Breach of Contract**

Where complainant contracted to sell to respondent 6,000 bushels of apples to be taken out of storage by respondent at the rate of 1,200 bushels a week, and respondent failed to pay for two truckloads received and rejected other shipments, claiming that they were not in suitable shipping condition, held, that respondent breached the contract by failing to order the apples out of storage at the time agreed upon and that complainant had packed and on hand in storage more apples of the grade specified than respondent would take, and, therefore, complainant should be awarded reparation for the purchase price of the two truckloads and the difference between the contract price of the truckloads rejected and the amount received on resale.\*

**Principal and Agent—Accord and Satisfaction—Ratification**

In a contract of sale, where the broker without the seller's authority agrees to give the buyer an allowance for claims against the seller and accepts the buyer's check for less than the purchase price in full settlement, and the seller receives and retains the check with full knowledge of the facts, held, that the accord and satisfaction, though unauthorized, was ratified by the seller.\*

**Authority of Agent—Failure to Show Accord and Satisfaction**

In a contract of sale, where the broker without the seller's authority agrees to grant the buyer an allowance for claims against the seller, but the buyer does not pay the reduced price and the seller repudiates the allowance agreement when informed thereof, held, that there was no accord and satisfaction and the allowance is not binding upon the seller.\*

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agricultural Decisions.—Ed.

*Mr. Gerald Barrett*, of Webster, New York, for complainant. *Mr. Milton S. DuBroff*, of DuBroff & DuBroff, of New York, New York, for respondent. *Mr. James A. O'Donnell*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

#### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Formal complaint was filed on September 20, 1948, alleging that respondent contracted to purchase 6,000 bushels of apples from complainant; that respondent failed to pay in full for 5 truckloads of apples shipped to respondent by complainant; and that respondent failed to accept and pay for a part of the apples. Complainant alleges that it sustained damages in the amount of \$3,095.07.

The Fruit and Vegetable Branch made an investigation of the complaint and a copy of its report of investigation was served upon complainant on February 2, 1949. On February 3, 1949, a copy of the report of investigation and a copy of the formal complaint were served upon respondent. Respondent filed an answer and a counterclaim for \$54.71 on March 15, 1949. Complainant's reply to the counterclaim was received April 12, 1949.

A hearing was held at New York City on September 9 and 10, 1949, at which both parties were represented by counsel. The record consists of the oral testimony of six witnesses, certain exhibits received in evidence, and the Department's report of investigation. At the hearing respondent withdrew its counterclaim and conceded liability on the part of respondent for \$750.25. Complainant reduced its claim to \$2,871.77.

#### FINDINGS OF FACT

1. Complainant, N. R. Peet & Son, Inc., is a corporation whose address is Webster, New York.

2. Respondent, Rockland County Fruit Farms, Inc., is a corporation whose address is Spring Valley, New York. At the time of the transaction involved in this proceeding, respondent was licensed under the act.

3. On or about October 14, 1947, a contract of sale was negotiated between the parties by Herschel Jones Marketing Services, Inc., a brokerage concern located at New York, New York. Complainant contracted to sell to respondent 5,000 bushels of Baldwin apples, U. S. No. 1 cannery grade, at \$1.55 per bushel for size 2½ inches and up, and \$1.30 per bushel for size 2¼ to 2½ inches, not more than 20 percent of the apples to be of the smaller size. The sale was made "F. O. B.

Cold Storage at Webster & Ontario, New York," and provided for shipment as available between January 1 and April 1, 1948. The parties agreed that the apples were to be sorted by complainant out of tree-run stock then in storage; that the apples were to be held in storage, in storage boxes on which rental was to be paid by complainant; that respondent was to provide boxes for shipment of the fruit and complainant was to transfer the apples to respondent's boxes at the time of shipment; and that complainant would segregate apples of  $2\frac{1}{4}$  to  $2\frac{1}{2}$  inches in size from those size  $2\frac{1}{2}$  inches and up. The parties also agreed that complainant would assume responsibility for shrinkage up to April 1, 1948, at which time all apples left in storage were to be accepted and paid for in full by respondent; that in the event any storage boxes were used in moving apples from storage, respondent was to pay complainant a deposit of 50 cents per box, to be redeemed upon the return of said boxes; that respondent was to pay complainant an advance of 25 cents per bushel immediately upon receipt of memorandum of sale, and an additional 25 cents per bushel on January 1, 1948, with the balance being paid as apples were withdrawn from storage; and that advance payments were to be applied on each lot as invoiced by complainant.

4. Respondent made two advances to complainant, one on October 31, 1947, for \$1,250, the other on January 14, 1948, also for \$1,250, or a total advance of \$2,500.

5. Respondent did not order shipment of any apples during January, February, or March, 1948, and did not send any boxes in which to pack the apples.

6. On or about April 1, 1948, the contract between the parties was amended so as to provide (a) for an increase in the quantity of apples to 6,000 bushels, consisting of 5,000 bushels of  $2\frac{1}{2}$  inches and up in size, and 1,000 bushels of  $2\frac{1}{4}$  to  $2\frac{1}{2}$  inches in size; (b) that sizes would be separated as follows:  $2\frac{1}{4}$  to  $2\frac{1}{2}$  inches,  $2\frac{1}{2}$  to  $3\frac{1}{4}$  inches, and  $3\frac{1}{4}$  inches and up; (c) that respondent would pay to complainant immediately a deposit of 50 cents per bushel on the additional quantity of apples so that all invoices on deliveries would show a uniform credit of 50 cents per bushel; (d) that respondent would order out approximately 1,200 bushels per week, starting April 5, 1948; and (e) that the price and all other specifications of the original contract would apply to the additional quantity of apples.

7. Respondent did not pay complainant the deposit of 50 cents per bushel on the additional 1,000 bushels contracted for under the amendment.

8. On or about April 6, 1948, respondent asked complainant, through the broker, if trucking service could be obtained at shipping points in

Western New York to haul the apples to destinations at Newark, New Jersey, and Brooklyn, New York, and return empty packages, for less than 33 cents each. As an accommodation to respondent, complainant secured truckmen to do the hauling at a price of 27 cents per package, the parties agreeing that respondent would reimburse complainant for all trucking charges paid, and that such action would not change the contract from an f. o. b. sale to a delivered sale.

9. On or about April 8, 1948, and at respondent's request, complainant shipped by truck, in used eastern boxes, Lot 201, consisting of 120 bushels of  $2\frac{1}{4}$  to  $2\frac{1}{2}$ -inch apples and 243 bushels of  $2\frac{1}{2}$ -inch and up apples, from Webster Cold Storage, and 294 bushels of  $2\frac{1}{2}$ -inch and up apples, from Fairport Cold Storage, or a total of 657 bushels. This lot was delivered to respondent's buyer at Newark, New Jersey. In remitting payment to the broker on April 14, 1948, respondent deducted \$97.14, representing an allowance made by the broker for claimed short weight, overtime unloading and additional storage. Complainant protested these deductions to the broker, but received and accepted the reduced amount from the broker as payment in full.

10. On or about April 12, 1948, and at respondent's request, complainant shipped by truck, in baskets and in used eastern boxes, Lot 202, consisting of 276 bushels of  $2\frac{1}{2}$ -inch and up apples from Webster Cold Storage and 322 bushels of  $2\frac{1}{2}$ -inch and up apples from Fairport Cold Storage, or a total of 598 bushels. This lot was delivered to respondent's buyer at Brooklyn, New York. In remitting payment to the broker on April 27, 1948, respondent deducted \$104, representing an allowance made by the broker for claimed short weight and additional storage. Complainant protested these deductions to the broker, but received and accepted the reduced amount from the broker as payment in full.

11. On or about April 15, 1948, and at respondent's request, complainant shipped by truck, in used eastern boxes, Lot 203, consisting of 650 bushels of  $2\frac{1}{2}$ -inch and up apples from Fairport Cold Storage. This lot was delivered to respondent at New York, New York. In remitting payment to the broker on May 11, 1948, respondent deducted \$79.38, representing an allowance made by the broker for claimed short weight, bad condition of the apples, and storage. Complainant protested these deductions to the broker, but received and accepted the reduced amount from the broker as payment in full.

12. Lots 204 and 205 were shipped by complainant to the respondent on April 24 and May 1, 1948, respectively, and consisted of a total of 1,277 bushels of apples from Ontario Cold Storage, contained in used eastern boxes and in storage crates. These lots were officially inspected at shipping point on April 21 and April 26, 1948, and were certified as

U. S. No. 1 Processing grade, 2½-inch minimum. Respondent paid complainant the full purchase price, including storage charges from April 1, 1948, on these two lots.

13. On or about April 28, 1948, complainant notified respondent through the broker that delivery was being tendered of the remainder of the apples under contract, all of which had been packed and inspected, except for a small lot at the Clyde storage, sorting of which would be delayed about two weeks. On or about April 30, 1948, the broker notified complainant that respondent refused to accept delivery, as tendered.

14. On or about May 8, 1948, and at respondent's request, complainant shipped by truck, in used eastern boxes, Lot 206, consisting of 200 bushels of 3-inch and up apples from Fairport Cold Storage and 450 bushels of 2½-inch and up apples from Ontario Cold Storage, or a total of 650 bushels. The apples were certified at the shipping points on April 28 and April 30, respectively, as U. S. No. 1 Processing grade. This lot was delivered to respondent's buyer at Newark, New Jersey. The truck broke down en route and the apples were not delivered at destination until May 13, 1948. Respondent accepted and resold the apples in Lot 206 after the broker agreed to make an allowance of \$182 due to the then condition of the fruit. No part of the purchase price for the apples contained in Lot 206 has been paid by respondent to the broker or complainant.

15. On or about May 15, 1948, and at respondent's request, complainant shipped by truck, in used eastern boxes and storage crates, Lot 207, consisting of 600 bushels of 2½-inch and up apples from Ontario Cold Storage. This lot was delivered to respondent's buyer at Newark, New Jersey. Federal inspection of Lot 207 at shipping point on April 28, 1948, certified the apples to be U. S. No. 1 Processing grade. Respondent accepted Lot 207 after the broker agreed to make an allowance of \$273 due to the then condition of the fruit. Complainant was not consulted with respect to this allowance. Complainant has received no part of the purchase price from respondent for the apples contained in Lot 207.

16. On May 21, 1948, at a conference held in New York City, complainant's N. R. Peet tendered to respondent's Frank Dallacasa warehouse receipts and official inspection certificates on the balance of the apples in storage, and demanded payment in accordance with the contract between the parties. Dallacasa refused to accept these documents and refused to make payment. Dallacasa offered to pay for Lots 206 and 207 if the allowances of \$182 and \$273 were granted, but Peet refused to grant any allowance.



17. On or about May 26, 1948, complainant shipped by truck to respondent, in used eastern boxes and storage crates, Lot 208, consisting of 165 bushels of  $2\frac{1}{4}$ - to  $2\frac{1}{2}$ -inch apples from Ontario Cold Storage; 76 bushels of  $2\frac{1}{4}$ - to  $2\frac{1}{2}$ -inch apples from Clyde Cold Storage; and 379 bushels of  $2\frac{1}{2}$ -inch and up apples from Clyde Cold Storage. These apples were inspected at the shipping points on April 28 and May 20, 1948, respectively, and were certified as U. S. No. 1 Processing grade. Upon arrival at Brooklyn, New York, and after personal inspection by respondent's representative, Mr. Dallacasa, the shipment was rejected by respondent. Thereafter, the apples in Lot 208 were resold by complainant for net proceeds of \$525.35.

18. On June 2, 1948, complainant sent a registered letter which was received by respondent on June 4, 1948, enclosing an invoice for all apples remaining in storage, as well as warehouse receipts and official inspection certificates thereon. Complainant advised respondent that the balance of the apples would be resold for respondent's account unless payment therefor was received by June 7, 1948. On June 5, 1948, respondent replied by wire and informed complainant of respondent's willingness to accept the balance of the apples provided inspection at New York City showed the fruit to be of U. S. No. 1 Cannery grade.

19. Lot 209, containing 1,238 bushels, represented the balance of the apples remaining in storage at the Webster, Fairport, Ontario and Clyde Cold Storages on June 5, 1948. During the period beginning on or about June 29, 1948, and ending on or about August 5, 1948, complainant resold these apples for net proceeds totaling \$1,131.01, or a loss of \$950.25. Complainant conceded that its accounting covered 6,290 bushels rather than 6,000 bushels of apples, or 290 bushels in excess of what was provided for in the contract, and agreed to reduce its claim on Lot 209 to \$726.95.

20. Throughout the transaction, complainant requested respondent, through the broker, to maintain the schedule of 1,200 bushels a week.

21. The contract between the parties, as amended on April 3, 1948, was not modified so as to eliminate respondent's responsibility for storage charges accruing after April 1, 1948.

22. In making the contract, shipment in interstate commerce was contemplated by the parties. All apples actually shipped under the contract moved in interstate commerce.

23. There is due and owing to complainant by respondent the sum of \$2,591.25, computed as follows:

## Lot 206:

450 bu. 2½" up at \$1.55 per bu.....	\$897. 50
200 bu. 3" at \$1.55 per bu.....	310. 00
650 bu. trucking at 27¢ per bu.....	175. 50
650 bu. additional storage at 5¢ per bu.....	32. 50

Due complainant..... \$1, 215. 50

## Lot 207:

600 bu. 2½" up at \$1.55 per bu.....	930. 00
600 bu. trucking at 27¢ per bu.....	162. 00
600 additional storage at 5¢ per bu.....	30. 00

Due complainant..... 1, 122. 00

## Lot 208:

379 bu. 2½" up at \$1.55 per bu.....	587. 45
241 bu. 2¼" at \$1.30 per bu.....	313. 30
620 bu. trucking at 27¢ per bu.....	167. 40
455 bu. additional storage at 10¢ per bu.....	45. 50
165 bu. additional storage at 5¢ per bu.....	8. 25

1, 121. 90

Less net proceeds on resale..... 525. 35

Due complainant..... 596. 55

## Lot 209:

602 bu. 2½" up at \$1.55 per bu.....	933. 10
505 bu. 2¼" at \$1.30 per bu.....	656. 50
131 bu. 3" at \$1.55 per bu.....	203. 05
565 bu. trucking.....	167. 81
968 bu. additional storage.....	120. 80

2, 081. 26

Less net proceeds on resale..... 1, 131. 01

950. 25

Less loss sustained on apples in excess of 6,000 bushels..... 223. 30

Due complainant..... 726. 95

Total amount due complainant..... \$3, 661. 00

Less respondent's advance being held by complainant..... 1, 069. 75

Net amount due complainant..... \$2, 591. 25

24. Formal complaint was filed on September 20, 1948, which was within 9 months after the cause of action accrued.

## CONCLUSIONS

The original contract of October 14, 1947, was entered into by Nelson R. Peet, an officer of complainant corporation, and Frank Dallacasa,

an officer of respondent corporation. The negotiations were handled through Herschel Jones of the Herschel Jones Marketing Service, Inc. The contract is evidenced by a memorandum of sale issued by the broker, copies of which were sent to both parties. The parties appear to be in agreement that the terms contained therein were those agreed upon. While the contract specified "U. S. No. 1 Cannery Grade" the U. S. Standards for Cannery Apples, effective July 23, 1930, were superseded by the U. S. Standards for Apples for Processing, which became effective September 2, 1946. The parties evidently intended to contract on the basis of the standards then in effect. The memorandum states "Sale made—FOB Cold Storage at Webster & Ontario, New York" and "Time of Shipment—as available between Jan. 1st & April 1st, 1948." Although not expressed in the memorandum, the arrangement was that respondent would inform complainant of the number of bushels of apples to be packed and respondent would then send trucks to pick them up. Respondent failed completely to perform under the contract. On or about April 1, 1948, the contract was amended by the parties to increase the quantity from 5,000 bushels to 6,000 bushels. The amendment is evidenced by the broker's memorandum dated April 3, 1948. It contains no change as to the basis of sale or the time of shipment which were previously quoted. However, the broker sent a telegram to complainant dated April 2, 1948, stating respondent would take 1,200 bushels per week beginning April 5, 1948. Whether complainant answered this telegram is not shown.

At the oral hearing Herschel Jones testified that Dallacasa agreed to take two truckloads of apples, or approximately 1,200 bushels per week and that Peet agreed to this. While Peet denied at the hearing the making of such agreement, complainant adopts Jones' testimony in its brief as correct. We conclude that the parties understood and agreed at the time of the amendment that respondent would send trucks and take apples at the rate of approximately two truckloads a week, thus completing the contract by the end of the first week in May.

The crux of complainant's claims seems to be that respondent did not order the apples out of storage in accordance with their contract. On April 1, 1948, complainant had in storage approximately 8,000 bushels of tree-run apples. Peet testified that he started grading and packing the apples on April 3 and urged respondent, through the broker, twice a week thereafter, to take the apples. Jones testified that he called Dallacasa each week, asking him to take apples so as to maintain the schedule of 1,200 bushels a week. This witness testified that several times Dallacasa said he could not take more than one load a week because he had to fit deliveries from complainant in with

others for the same customer. However, the witness did state that on one or two occasions Dallacasa requested two loads a week, but complainant was unable to ship more than one because additional transportation was not available. It should be noted that, despite the accommodation service rendered by complainant in arranging for trucks, the responsibility for obtaining transportation for the apples was respondent's.

The evidence shows that no apples were shipped on April 5 because respondent was unable to arrange for trucking services. The first three lots were shipped on April 8, April 12 and April 15 at respondent's request and in trucks engaged by complainant. Apparently, request was made for shipment of a lot on the following Monday, April 18, but for some reason not explained in the record this lot was not shipped. It would seem from the letter dated April 17, 1948, sent by Jones to respondent, that respondent had requested Jones not to ship that load. Perhaps, some friction had developed between the parties as a result of the objections made by respondent to Jones with respect to the three lots shipped. Through May 8, 1948, six lots of apples, consisting of 3,832 bushels, were shipped to respondent. At all times during the transaction, complainant had packed and on hand more apples of the grade specified than respondent would take. The evidence establishes that complainant was acting in a spirit of cooperation throughout the transaction in order to obtain complete performance on respondent's part. Complainant extended credit where none was called for by the contract, acquiesced in certain allowances, and also arranged for transportation at a rate less than that obtainable by respondent. Throughout, complainant was insisting on compliance with the contract. It is concluded that respondent breached the contract by failing to order all of the apples out of storage at the rate agreed upon.

Respondent contends that complainant failed to prove that any of the lots delivered to the carrier by complainant were in suitable shipping condition. However, the real question is whether the apples were of the grade specified and in suitable shipping condition at the time they should have been ordered out of storage by respondent. Respondent could not extend the time when the apples were to be ordered out of storage merely by refusing to so order them, or thereby shift liability for deterioration to complainant. Official inspections were made of lots 204 to 209 in storage on April 21, 26, 28 and 30, and May 12 and 20, 1948, and the fruit was certified as meeting the grade and size requirements of the contract, except for 478 bushels inspected at Fairport, New York, storage on April 21, 1948. These apples were part of Lot 209. The 478 bushels were certified as "Fails to grade

U. S. No. 1 Processing Grade  $2\frac{1}{4}$  to  $2\frac{1}{2}$  In. Min. only account varietal mixture." The apples in this lot other than Baldwin were certified to be characteristic of Starks with "many samples 5 to 15%, most samples no varietal mixture." The Standards permit a total tolerance of 10 percent for defects, including varietal mixture. A notation on the worksheet of the inspector reads "Average approximately 10 percent Stark mixed in." The certificate issued upon re-inspection on June 11, 1948, makes no reference whatever to any varietal mixture. Peet testified that the inclusion of Starks was immaterial because this variety has never been considered inferior to Baldwins and that it would take an expert to distinguish the two varieties. The evidence fails to establish that these apples failed to meet the grade requirements of the contract.

Respondent contends that Lot 207 was not in suitable shipping condition because Federal inspection at New York City on May 17, 1948, disclosed 40 percent of the apples to be below U. S. No. 1 Processing grade. This lot was inspected at Ontario, New York, on April 28, 1948, and the apples were certified to be U. S. No. 1 Processing grade. Due to respondent's failure to take the apples according to schedule, this lot was not shipped until May 15, 1948. Furthermore, the inspection at New York was restricted to the two stacks at the end of the truck and the three stacks at the side door. The evidence is insufficient to show that the apples in Lot 207 were not in suitable shipping condition at the time respondent should have ordered shipment.

There is no merit to respondent's contention that apples shipped from storages other than Webster and Ontario, New York, constituted a breach of the contract. Complainant's testimony is uncontradicted that in March 1948, respondent's representative, Larry Stockman, was shown the lots in storage at Fairport and Clyde as well as Webster and Ontario, New York. In addition, Lots 201, 202, and 203, which were accepted by respondent, each contained apples from the Fairport storage. Throughout the entire transaction, respondent never objected to receiving apples from storages other than Webster and Ontario. The first complaint with respect thereto was contained in respondent's answer, which was filed on March 15, 1949, more than 9 months after respondent had received warehouse receipts and inspection certificates on the balance of the apples, some of which were stored in Fairport and Clyde.

In its brief, respondent contends that the allowances agreed upon by Jones on Lots 201, 202, 203, 206, and 207 are binding upon complainant. The argument is that Jones had apparent authority to grant the allowances because he handled the entire transaction for complainant, received the payments from respondent, and none of the

allowance agreements when brought to complainant's attention were renounced by complainant directly to respondent. Respondent also argues that the facts with respect to Lots 201, 202, and 203 constituted an accord and satisfaction.

First, we will discuss Lots 201, 202, and 203. At the oral hearing, Jones testified that Peet instructed him to make the best possible settlements. Peet denied giving such instruction. However, there is no dispute that in each instance Jones granted an allowance to respondent and received a check for the reduced price. Jones informed complainant of the allowances when granted and also forwarded to complainant copies of the invoices in the reduced amounts which were sent to respondent. He sent complainant account sales or vouchers showing the deductions made on each lot and checks for the purchase prices less the deductions. Complainant questioned the validity of respondent's claims to Jones, but cashed the checks and did not repudiate the allowance agreements directly to respondent. The mere fact that Jones had authority to negotiate the contract and collect the purchase prices did not clothe him with apparent authority to enter into an accord and satisfaction with respondent. Such authority to act must be actually conferred by the principal or, if not authorized, the act may be ratified. There is no question that the checks payable to the broker were tendered by respondent in full satisfaction of its demands and Jones received the checks in that tenor. If an agent without authority to grant allowances for his principal does exercise such authority and receives the lesser amount, and the principal appropriates the money so paid, with full knowledge of the facts, he, of course, ratifies the act of the agent. *Gotham Nat. Bank v. Sharood*, 23 F. 2d 567 (C. C. A. 2d, 1928); *Pekin Cooperage Co. v. Gibbs*, 170 SW 574 (Ark. 1914); *Elmer G. Porter v. Hashinsky, Breslow, Richer & Co.*, PACA Docket No. 23, S. 7. The statements contained in *Cashmar-King Supply Co. v. Dowd*, 146 N. C. 191, 59 S. E. 685, are pertinent here. The court said:

"It is not within the power of the plaintiff to repudiate his [the agent's] act as being one not authorized, and apply the money as a payment on the debt. The money must be accepted according to the intention of the parties to the transaction and applied accordingly; that is to the full discharge of \* \* \* liability, or rejected for the want of authority, in which case the parties would be restored to their original rights."

It is concluded that complainant ratified the accord and satisfaction on Lots 201, 202, and 203.

Allowances totaling \$455 on Lots 206 and 207 were granted to respondent by Jones. At one point in the testimony, Jones stated that Peet was not consulted as to the allowance on Lot 206 but subsequently

Jones testified that Peet was consulted. Admittedly, Peet was not consulted with respect to the allowance on Lot 207. There is no showing that Jones was authorized to make the allowances. Peet testified that at the meeting with Dallacasa and his attorney on May 21, 1948, respondent refused to pay for Lots 206 and 207 unless the allowances were granted and he (Peet) told them that no allowance would be made. There was no payment and acceptance and therefore no accord and satisfaction and ratification thereof, as to Lots 206 and 207. It is concluded that complainant is not bound by the broker's offer of allowances on these two lots.

There remains the question of respondent's liability for additional storage which accrued beginning April 1, 1948. The original contract provided that all apples left in storage as of April 1, 1948, were to be accepted and paid for in full by the respondent. In other words, complainant was to pay the storage up to April 1 and respondent was to assume all subsequent storage charges. The amendment to the contract did not specify any change with respect to liability for storage. It follows that respondent is liable for the storage charges in question.

Respondent's failure to make full payment for Lots 206 and 207 was in violation of section 2 of the act. Respondent's rejection of Lots 208 and 209 was without reasonable cause and in violation of section 2 of the act.

Complainant resold the rejected apples and there is no suggestion of irregularity in connection therewith. Respondent's counsel conceded that the price of apples of the grade involved had dropped below the contract price by the time of resale. We consider the resales properly made and for the best prices obtainable.

Complainant's damages resulting from respondent's failures to comply with the terms of the contract and violations of the act are as stated in Finding of Fact No. 23. Reparation should be awarded to complainant and against respondent in the amount of \$2,591.25, with interest. Respondent's counterclaim has been withdrawn and should be dismissed. The facts should be published.

### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$2,591.25, with interest thereon at 5 percent per annum from June 1, 1948, until paid.

The respondent's counterclaim is dismissed.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2418)

WESTERN VEGETABLE DISTRIBUTORS, INC. v. SHOWKER BROTHERS, INC.  
PACA Doc. No. 5301. Decided April 4, 1950.

**Failure to Pay Purchase Price—Default**

Respondent's failure to pay the purchase price for a carload of mixed vegetables delivered to and accepted by respondent, and his failure to file an answer, constituting an admission of the facts alleged in the complaint and a waiver of oral hearing, entitles complainant to an award of reparation in the amount of the purchase price, with interest.\*

*Messrs. Ireland & Ireland*, of Denver, Colorado, for complainant. *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Informal complaint was received by wire December 2, 1949. Formal complaint was filed February 3, 1950, alleging that complainant sold to respondent a carload of mixed vegetables for \$1,067.50, f. o. b. Denver, Colorado, and that respondent failed to pay the purchase price. A copy of the report of investigation made by the Fruit and Vegetable Branch was served on complainant's attorneys February 23, 1950. Copies of the report of investigation and the formal complaint was served on the respondent corporation March 1, 1950.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint and a waiver of oral hearing. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

**FINDINGS OF FACT**

1. Complainant, Western Vegetable Distributors, Inc., is a corporation whose address is 67 Wazee Market, Denver 4, Colorado.

2. Respondent, Showker Brothers, Inc., is a corporation whose address is 31 Grey Street, Harrisonburg, Virginia. At the time of the transaction complained of herein, respondent was licensed under the act.

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.



3. On or about September 14, 1949, complainant sold to respondent the following fresh vegetables:

	<i>Per crate</i>
40 crates Lettuce .....	\$5.50
30 crates Cauliflower .....	2.10
20 crates Carrots .....	3.25
10 crates Endive .....	4.00
20 crates Spinach .....	2.25
10 crates Gr. Onions .....	3.65
5 crates Parsley .....	3.15
10 crates Radishes .....	3.15
37 crates Cantaloupes .....	3.00
	<i>Per sack</i>
125 sacks Dry Onions .....	1.75
151 sacks Cabbage .....	1.00

for a total contract price, including \$70 top ice, of \$1,067.50.

4. On or about September 14, 1949, commodities of the kind, quality, grade and size called for in the contract of sale were shipped by complainant in car PFE 45631 from Colorado to respondent at Harrisonburg, Virginia.

5. Upon arrival of the shipment respondent accepted the commodities but has failed to pay complainant the contract price of \$1,067.50, or any part thereof.

6. Formal complaint was filed February 3, 1950, which is within 9 months after the cause of action accrued.

### CONCLUSIONS

Failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, as provided in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that on or about September 14, 1949, complainant sold to respondent a carload of mixed vegetables for a total price of \$1,067.50; that the vegetables were shipped in interstate commerce and accepted by respondent; and that respondent has not paid the purchase price or any part thereof.

It appears from the record that the respondent acknowledged the debt and promised to make payment in January 1950, but failed to do so.

Respondent's failure to pay the agreed purchase price is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$1,067.50, with interest, and the facts should be published.

**ORDER**

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$1,067.50, with interest thereon at the rate of 5 percent per annum from October 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2419)

PACA Doc. No. 5055.\* Decided April 11, 1950.

**Dismissal—Failure to Fulfill Condition Precedent**

Where complainant alleged that he purchased five carloads of onions from respondent, who failed to deliver the onions in accordance with the contract, but respondent contended that the sale was conditional upon respondent's ability to procure the onions from the Colorado owner, and that respondent was unsuccessful in its efforts to obtain the onions, it is held, in a suit by complainant for damages resulting from respondent's alleged breach of contract, that the facts and circumstances and the logical conclusions to be drawn therefrom, support a finding that the contract of purchase and sale of the onions was conditional upon respondent's ability to procure the onions, and the complaint should be dismissed.\*\*

**Evidence—Disputed Date of Transaction**

In a conditional sale of certain onions, where the date of the transaction is disputed by the parties, the purchaser claiming that it took place on November 6, 1947, while the seller states that it was October 6, it is held, that since the agreed terms and the price of the onions are consistent only with the October 6 market quotations, the contract between the parties was entered into on October 6, 1947, as contended by respondent.\*\*

*Mr. David Siskind*, of New York, New York, and *Mr. Harold Koven*, of Chicago, Illinois, for complainant. *Mr. R. W. Gudgeon* and *Mr. LeRoy W. Gudgeon*, of Chicago, Illinois, for respondent. *Mr. Gilbert A. Horn*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Formal complaint was filed on August 19, 1948, in which it is alleged that respondent sold to complainant five carloads of onions and accepted complainant's check in the amount of \$5,000 as a

\*As explained in Prefatory Note, the identities of the parties are not disclosed.—Ed.

\*\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

deposit on the purchase price; that respondent failed and refused to deliver the onions called for in the contract; and that as the result of respondent's breach of contract, complainant was compelled to replace the onions from other sources at higher prices and thereby sustained damages in the amount of \$3,648.

A copy of the formal complaint was served upon respondent by registered mail on October 16, 1948, together with a copy of the report of investigation prepared by the Regulatory Division of the Fruit and Vegetable Branch of the Department. A copy of the report of investigation was served upon complainant by registered mail on October 14, 1948. Respondent filed an answer to the complaint on November 18, 1948, denying all material allegations of the complaint. By way of defense, respondent contends that no enforceable contract existed between the parties for the reason that the agreement to sell the onions was contingent upon respondent's ability to procure the five carloads from the owner in Colorado. Respondent states that when it found it could not obtain the onions, it notified complainant of that fact and in complainant's presence, destroyed the check given as a deposit. As a further defense, respondent pleaded the Statute of Frauds. An oral hearing was requested.

The oral hearing was held at Chicago, Illinois, on June 2, 1949. Both parties were represented by counsel. Complainant appeared and testified in his own behalf and \* \* \* testified on behalf of respondent. Both parties submitted briefs.

#### FINDINGS OF FACT

1. Complainant, \* \* \*, is an individual whose address is \* \* \*.

2. Respondent, \* \* \*, is a partnership composed of \* \* \*, whose address is \* \* \*. At the time of the transaction involved in this proceeding, respondent was licensed under the act.

3. On or about October 6, 1947, in the course of interstate commerce, respondent contracted to sell to complainant five carloads of yellow Danver onions, grade U. S. No. 1, at \$2.25 per 50-pound sack, provided the onions could be procured from the owner in Colorado.

4. At respondent's request, complainant delivered his blank check to respondent, which respondent completed in complainant's presence. The check was dated October 6, 1947, made payable to the order of respondent, in the amount of \$5,000. Respondent wrote the following notation on the back of the check: "Deposit on 5 cars yellow Danver onions approximately 75%-2'' USONE at 2.25 fob shipment prompt car daily weather permitting." Complainant signed the check as drawer and left it in respondent's possession. Respondent agreed

to mail a written confirmation of the sale to complainant's office in New York, if the onions could be obtained.

5. On or about October 9, 1947, respondent advised complainant that the Colorado owner did not wish to sell the onions, and, therefore, the agreement could not be consummated. Respondent destroyed complainant's check in complainant's presence.

6. On November 10, 1947, complainant sent respondent the following telegram: "DEMAND SHIPMENT FIVE CARS COLORADO USONE YELLOW DANVERS 75% TWO INCH LARGER NOT ACCEPTING CANCELLATION OF CONTRACT."

7. Respondent did not deliver any onions in connection with the transaction between the parties.

8. An informal complaint was filed on January 8, 1948, which was within 9 months after accrual of the alleged cause of action.

### CONCLUSIONS

Complainant contends that the contract in this case was entered into on November 6, 1947, rather than October 6, and that the date written on the check was in error. Complainant also contends that an unconditional contract of purchase and sale was consummated between the parties, as evidenced by the notation written on the back of the check. Respondent, on the other hand, contends that the transaction actually took place on October 6, 1947, and that the sale was contingent upon its ability to procure the onions from the owner in Colorado, who had offered them for sale a few days previously.

As to the date of the transaction, the evidence appears to favor respondent's position. In filling out the blank check tendered by complainant, \* \* \* wrote the date as October 6, 1947. After the check was filled in, it was handed to complainant who found it acceptable and signed it as drawer. Complainant testified that he did not look at the date. However, it seems unlikely that both persons would have failed to notice a mistake as to the month. Moreover, the price which complainant agreed to pay for the onions, \$2.25 per sack f. o. b. shipping point, indicates that the contract was entered into on October 6 rather than November 6, 1947. Official notice is taken of the Federal market news reports issued at Chicago, Illinois, for October 6 and November 6, 1947. Shipping point quotations for Colorado onions on these days were confined to Sweet Spanish onions, grade U. S. No. 1, from the Arkansas Valley. For October 6, 1947, it was stated "1¾" min. 2.00-2.20, mostly 2.10-2.15" and for November 6 "2-3" & 3" & lgr. very few sales, 2.40." There is some indication in the record that Danver onions demand a slightly higher price than

Sweet Spanish onions. Assuming the existence of such a price differential, the agreed terms and price are consistent only with the October 6 quotations. It is concluded that the contract between the parties was entered into on October 6, 1947.

The principal issue for determination is whether the contract of sale was subject to a condition precedent, that is, respondent's ability to procure the quantity of onions from sources in Colorado. Respondent's witness, \* \* \*, testified that he met \* \* \* at the produce terminal tracks in Chicago, Illinois, early in the morning on October 6, 1947; that \* \* \* asked \* \* \* whether he had onions for sale; and that he advised \* \* \* that a Colorado shipper had offered for sale a block of 5 to 8 carloads of onions several days previously, which \* \* \* did not purchase because he had sufficient onions on hand, but that \* \* \* had offered to undertake to sell the onions for the shipper. \* \* \* testified that \* \* \* indicated he was interested in buying the onions. According to \* \* \*, it was necessary for him to contact \* \* \* at \* \* \*, to determine whether the onions were still available, and, if so, to confirm the sale. \* \* \* further testified that, later in the morning, \* \* \* came to \* \* \* office and, while he was there, \* \* \* attempted to contact \* \* \* by long distance telephone, but was unable to do so; that \* \* \* advised \* \* \* that if he were able to obtain the onions for him, it would be necessary to wire the shipper a substantial deposit at once; and that, accordingly, he requested \* \* \* to place a \$5,000 deposit on the order. \* \* \* tendered \* \* \* a blank check which \* \* \* dated October 6, 1947, and filled in for \$5,000, payable to respondent. \* \* \* states he wrote on the back of the check what the contract terms would be if he were successful in obtaining the onions. \* \* \* then signed the check as drawer and left it with \* \* \*. According to \* \* \*, \* \* \* said that if the onions could be obtained, a written confirmation of the purchase should be sent to complainant's New York office. The witness testified further that \* \* \* left his office on other business before he was able to reach the Colorado shipper; and that he was not able to contact this party until several days later, at which time he was informed that the shipper had decided not to sell the onions. \* \* \* stated that, on or about the 9th of October, \* \* \* returned to \* \* \* office and \* \* \* advised him that he was unable to obtain the onions; that he returned the deposit check to \* \* \*, who made no objection; and that \* \* \* heard nothing further from \* \* \* until November 10, on which date he received \* \* \* telegram demanding shipment of five carloads of Colorado Danver onions under the alleged contract.

\* \* \* testimony with respect to the transaction is that on November 6, 1947, \* \* \* told him he had 40 carloads of Danver onions stored in Colorado and he was willing to sell eight carloads on joint account at \$1.90 per sack or outright at \$2.25 because he needed money to cover calls on certain onion futures contracts he had on the Chicago Mercantile Exchange; that \* \* \* agreed to sell him five carloads at \$2.25 provided \* \* \* gave him a \$5,000 deposit; and that \* \* \* went to \* \* \* office later in the morning and tendered \* \* \* his blank check, which \* \* \* filled in, including the terms of the contract appearing on the back of the check. \* \* \* testified that \* \* \* used the telephone saying he was attempting to contact his brother in Colorado, but that the call was not completed. He admitted that it was agreed that \* \* \* would prepare a written confirmation of the sale and forward it to \* \* \* New York office. \* \* \* said he left \* \* \* office and went to Minneapolis, Minnesota, on other business; that he returned to Chicago on November 10 and \* \* \* said the onion deal was off; and that he tore up the check and dropped it in an ashtray. \* \* \* testified that he retrieved the torn check and immediately went to the local Fruit and Vegetable Branch office of the Department, and on their advice sent a telegraphic demand for delivery of the five carloads of onions in accordance with the contract.

Complainant places considerable reliance on the wording of the notation on the back of the check to support his testimony that the contract of sale was unconditional. It is true that the notation, on its face, expresses an unconditional agreement. However, there are facts which tend to support \* \* \* testimony that the contract was conditional. For instance, \* \* \* attempt in the presence of \* \* \* to place a telephone call to Colorado plus the probability that the check was written after the uncompleted call, indicates that \* \* \* and complainant were aware at the time that further information was necessary before the sale became final. The very fact that such a large deposit was made by complainant raises an inference that this transaction was on a different basis than other contracts entered into by the parties which were admittedly unconditional. These contracts for the sale of potatoes, dated September 29 and October 9, 1947, did not require complainant to make any deposits or advances. The potatoes were shipped to complainant on open account. On the basis of all the facts and circumstances, and the logical conclusions to be drawn therefrom, it is concluded that the contract of purchase and sale of the five carloads of onions was conditional upon respondent's ability to procure the onions. Accordingly, the complaint should be dismissed.

**ORDER**

The complaint is hereby dismissed.  
Copies hereof shall be served upon the parties.

(No. 2420)

PACA Doc. No. 5278.\* Decided April 11, 1950.

**Dismissal—Settlement Between Parties**

Where complainant's attorney notified the Department that the controversy has been settled and requested dismissal of the complaint, the complaint is, accordingly, dismissed.

*Messrs. Weinberg and Green*, of Baltimore, Maryland, for complainant. *Messrs. Due, Nickerson & Whiteford*, of Baltimore, Maryland, for respondent. *Mr. Frederick W. Woodley*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**ORDER OF DISMISSAL**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). A formal complaint was filed December 14, 1949, for the recovery of damages which allegedly resulted from respondent's rejection of a truckload of beans purchased from complainant. On February 21, 1950, respondent filed an answer in which it denied liability.

By letter dated March 29, 1950, complainant's attorney advised the Department that the parties had arrived at an amicable settlement of the controversy. Dismissal of the proceeding was requested. Accordingly, the complaint is hereby dismissed.

Copies hereof shall be served upon the parties.

(No. 2421)

**BELSON BROS. v. LESLIE POTNICK.** PACA Doc. No. 5299. Decided April 12, 1950.

**Failure to Pay Purchase Price—Default**

Where complainant alleged that it sold onions to respondent who failed to pay the agreed purchase price and where respondent failed to file an answer, held, that his failure to file an answer constitutes an admission of the facts alleged in the complaint, and his failure to pay the purchase price is a viola-

\*As explained in Prefatory Note, the identities of the parties are not disclosed.—Ed.

tion of the act for which reparation should be awarded complainant in the amount of the purchase price.\*

*Messrs. Foley & Foley*, of Chicago, Illinois, for complainant. *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

#### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Informal complaint was received March 18, 1949. Formal complaint was filed October 25, 1949, alleging that complainant sold to respondent 188 sacks of onions and that respondent received the onions but failed to pay the agreed purchase price. A copy of the report of investigation prepared by the Fruit and Vegetable Branch was served upon complainant's attorney on December 14, 1949. Copies of the report of investigation and the formal complaint were served personally upon the respondent on February 27, 1950.

At the time of service of the formal complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint and a waiver of oral hearing. Respondent has failed to file an answer and this proceeding is disposed of on the basis of the formal complaint and the report of investigation.

#### FINDINGS OF FACT

1. Complainant, Belson Bros., is a partnership consisting of Joe Belson and Herman Belson, whose address is 1425 South Racine Avenue, Chicago, Illinois.

2. Respondent is an individual, Leslie Potnick, whose address is 3423 South Halsted Street, Chicago, Illinois. At the time of the transaction complained of herein respondent was licensed under the act.

3. On or about November 27, 1948, complainant sold to respondent 188 sacks of onions at \$1.50 per sack or a total price of \$282. At that time, the onions were at Chicago, Illinois, in car RD 14751 in which they had been shipped from Wisconsin. Respondent unloaded the onions from the car into his truck for the purpose of transporting them to Florida.

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.



4. Respondent accepted the onions and transported them out of the State of Illinois, but has not paid the agreed purchase price of \$282 or any part thereof.

5. Informal complaint was received March 18, 1949, which was within 9 months after the cause of action accrued.

### CONCLUSIONS

The failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint as provided for in the rules of practice (7 CFR 47.8 (c)). The facts thus admitted are that the complainant sold 188 sacks of onions to the respondent at \$1.50 per sack or for a total sales price of \$282; that respondent accepted the onions and transported them in interstate commerce; but that respondent has not paid the agreed purchase price of \$282 or any part thereof. Respondent's failure to pay the agreed purchase price is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$282 with interest and the facts should be published.

### ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$282, with interest thereon at the rate of 5 percent per annum from December 1, 1948, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2422)

**FRANK J. CRIVELLA & CO., INC. v. J. EISENBERG & SONS.** PACA Doc. No. 5283. Decided April 12, 1950.

### Failure To Pay Purchase Price—Default

Where complainant alleged that it sold tomatoes to the respondent and respondent did not pay the full purchase price and where respondent did not file an answer, held, that respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint, respondent's failure to pay the full purchase price is a violation of section 2 of the act, and complainant should be awarded reparation in the amount of the unpaid balance due, with interest.\*

*Frank J. Crivella & Company, Inc.*, of Pittsburgh, Pennsylvania, complainant *pro se*. *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). An informal complaint was filed June 23, 1949. Formal complaint was filed January 26, 1950, alleging failure on the part of the respondent to pay the full purchase price for 150 lugs of tomatoes sold by complainant to respondent on or about June 20, 1949.

The Regulatory Division of the Fruit & Vegetable Branch made an investigation and a copy of its report of investigation was served upon both parties on February 7, 1950. On the same date, a copy of the formal complainant was served upon respondent.

At the time of service of the complainant, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint. Respondent has failed to file an answer and this proceeding is disposed of on the basis of the formal complaint, including the attached exhibits, and the report of investigation.

### FINDINGS OF FACT

1. Complainant, Frank J. Crivella & Co., Inc., is a corporation whose address is 60 21st Street, Pittsburgh, Pennsylvania.

2. Respondent is an individual, Joseph Eisenberg, trading as J. Eisenberg & Sons, whose address is 542 Washington Street, Johnstown, Pennsylvania. At the time of the transaction complained of herein, respondent was licensed under the act. This license terminated September 11, 1949. Respondent and Sam Silverman are now trading as Eisenberg Produce Company under License 124132 issued September 28, 1949.

3. On or about June 20, 1949, in the course of interstate commerce, complainant sold to respondent 150 lugs of Texas tomatoes which had arrived at Pittsburgh, Pennsylvania, in car ART 26118. Respondent purchased the tomatoes on the basis of his own inspection. The agreed price was \$3.50 per lug, f. o. b. Pittsburgh, or a total price of \$528.

4. The tomatoes were loaded onto a truck hired by respondent and transported to Johnstown, Pennsylvania.

5. Respondent paid complainant \$176 on June 29, 1949, but has not paid the balance of \$352 or any part thereof.

6. Formal complaint was filed January 26, 1950, which was within nine months after the cause of action accrued.

### CONCLUSIONS

Failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint as provided for in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that complainant sold 150 lugs of Texas tomatoes to the respondent for a total purchase price of \$528; that respondent inspected and accepted the tomatoes; and that respondent paid \$176 to the complainant but has not paid the balance of \$352 or any part thereof. Respondent's failure to pay the amount remaining due on the agreed purchase price for the tomatoes is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$352 with interest and the facts should be published.

### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$352, with interest thereon at the rate of 5 percent per annum from July 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2423)

**H. SACKS & SONS v. NEWBURGH PRODUCE COMPANY.** PACA Doc. No. 5298. Decided April 12, 1950.

#### Failure to Pay Purchase Price—Default

Where complainant alleged that respondent failed to pay the full purchase price for a truckload of potatoes and where respondent failed to file an answer to the complaint, held, that failure of respondent to file an answer constitutes an admission of the facts alleged in the complaint, and its failure to pay the full purchase price is in violation of section 2 of the act for which complainant is entitled to an award of reparation in the amount of the purchase price, with interest.\*

*Mr. Gordon M. Lipetz*, of Riverhead, New York, for complainant. *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*).

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

Informal complaint was received December 9, 1949. Formal complaint was filed February 2, 1950, alleging failure of respondent to pay the full purchase price for a truckload of potatoes sold to respondent on or about September 11, 1949.

A copy of the report of investigation made by the Fruit and Vegetable Branch was served upon complainant's attorney February 23, 1950. On the same date, copies of the report of investigation and the formal complaint were served upon respondent.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

#### FINDINGS OF FACT

1. Complainant, H. Sacks & Sons, is a partnership composed of Julius Sacks, Joseph Sacks, and Abraham Sacks, whose post office address is Main Street, East Quogue, Long Island, New York.

2. Respondent, Newburgh Produce Company, is a partnership composed of Samuel and Hyman Moses, whose post office address is 7-9 Hasbrouck Street, Newburgh, New York. At the time of the transaction complained of herein, respondent was not licensed under the act but was subject to license. In December, 1949, respondent paid license fee arrearage to cover the period when this transaction occurred.

3. On or about September 11, 1949, complainant sold to respondent 496 15-lb. bags of U. S. No. 1 potatoes at 48 cents per bag and 249 50-lb. bags at \$1.45 per bag, delivered at Newburgh, New York, terms C. O. D., or a total sales price of \$599.13.

4. On or about September 11, 1949, complainant shipped by truck, in interstate commerce, from Mattituck, New York, via New Jersey, to respondent in Newburgh, New York, 745 bags of potatoes which complied with the terms of the contract.

5. Upon arrival of the potatoes at Newburgh, New York, respondent accepted delivery and gave the truck driver a check for \$599.13, payable to the order of complainant. The check was returned unpaid, marked "insufficient funds", and complainant was charged a protest fee of \$1.40. Complainant's claim against respondent was thus increased to \$600.53.

6. On or about October 5, 1949, respondent paid complainant the sum of \$150.20, by three checks, and on or about October 19, 1949,

respondent paid complainant an additional \$75, making a total of \$225.20, leaving a balance due of \$375.33, no part of which has been paid.

7. Formal complaint was filed within nine months after the cause of action accrued.

### CONCLUSIONS

Failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint, as provided in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that complainant sold a truckload of potatoes to respondent for \$599.13; that respondent shipped in interstate commerce, to respondent, potatoes which met contract requirements; that respondent accepted the potatoes; that respondent gave complainant a check for the total purchase price of \$599.13; that the check was returned unpaid due to insufficient funds, and complainant was charged a protest fee of \$1.40; and that respondent subsequently paid complainant \$225.20, leaving a balance due of \$375.33, no part of which has been paid.

Respondent's failure to pay the purchase price and protest fee in full is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$375.33, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$375.33, with interest thereon at the rate of 5 per cent per annum from October 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2424)

DINGFELDER & SAPERSTONE, INC. v. SENTER BROTHERS, INC. PACA  
Doc. No. 5155. Decided April 24, 1950.

**Contract of Purchase and Sale—Disputed Terms—Purchase after Inspection—  
Buyer Bound by Inspection of its Agents—Failure to Pay Balance of Purchase  
Price**

Where complainant-seller, in an action for the unpaid balance of the purchase price of a truckload of beans, alleged that respondent-buyer purchased the beans after a personal inspection by respondent's buying agents at complainant's packing house, and respondent alleged that the beans were purchased upon the basis of an express warranty by complainant of sound arrival, but

respondent's buying agents admitted inspecting the beans at complainant's packing house and seeing rotten ends on a great many of the beans being loaded, it is concluded, that it is unlikely that complainant as a reasonable businessman would guarantee sound arrival of a truckload of beans in that condition to be shipped from Florida to New York, and, in view of all the circumstances surrounding the transaction, it is held, that this was a purchase and sale after inspection by respondent's agents with no express warranty of sound arrival by complainant, that respondent was bound by the inspection of its agents, and that failure to pay complainant the full purchase price for the beans was a violation of the act entitling complainant to an award of reparation for the balance of the purchase price.\*

**Purchase after Inspection—No Warranty by Seller of Value or Quality**

Where a truckload of beans was purchased after inspection by the buyer's agents, who claimed that the seller guaranteed sound arrival of the beans, but respondent's agents admitted inspecting the beans and observing rotten ends on a great many of the beans being loaded, it is held in effect that, where a dealer buys a perishable commodity in which he habitually dealt, fully understanding that what he was buying was not in first class condition and had, in some degree, the very defect of which he later complained, there was no warranty of value or quality under such circumstances.\*

*Dingfelder & Saperstone, Inc.*, of New York, New York, complainant *pro se*.  
*Mr. Irving Coopersmith*, of New York, New York, for respondent. *Miss Lenore H. Langford*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

In this reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*), a formal complaint was filed on June 21, 1949, in which complainant alleged that respondent purchased, after inspection, a truckload of beans but failed to pay the full purchase price. A copy of the complaint and a copy of the report of investigation made by the Fruit and Vegetable Branch were served by registered mail upon respondent on June 30, 1949. A copy of the report of investigation was served by registered mail upon complainant on the same day. On July 18, 1949, respondent filed an answer to the complaint, admitting the purchase of the truckload of beans from complainant, but alleging that complainant expressly warranted that the beans would arrive at New York City in sound condition.

Since the amount of damages claimed is under \$500, the issues are determined under the shortened procedure provided by the rules of

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

practice. The evidence consists of complainant's opening statement of facts, respondent's answering statement of facts, complainant's statement in reply, and the report of investigation.

### FINDINGS OF FACT

1. Complainant, Dingfelder & Saperstone, Inc., is a corporation whose principal address is 290 Washington Street, New York, New York, with a branch office at Sanford, Florida.

2. Respondent, Senter Brothers, Inc., is a corporation whose address is 319 Jay and Washington Streets, New York, New York. At the time of the transaction involved in this proceeding, respondent was licensed under the act.

3. On or about November 2, 1948, in the course of interstate commerce and by oral contract, complainant sold to respondent a truck-load consisting of 542 bushel hampers of Bountiful beans at an agreed price of \$2.90 per hamper, f. o. b. Zellwood, Florida, for a total price of \$1,571.80. The beans were purchased after inspection by Samuel Senter and Roy F. Symes, Jr., respondent's buying agents.

4. In the presence of respondent's buying agents, the beans were graded, packed, and loaded on the truck at Zellwood, Florida, and were shipped from that point to respondent at New York City.

5. The beans arrived at New York City on November 4, 1948, and at 9:45 p. m. on that date an inspection of samples from the shipment by the Standard Inspection Service showed the condition of the beans to be as follows:

"Clean and bright. Fairly well to well shaped few slightly curved. Medium to large in size. Good green color. Firm, tender and crisp. Fairly good snap. Range less than 1% to 20% average 11 to 12% decay."

6. Respondent telephoned complainant the results of the inspection and stated that the shipment would be turned over to complainant in New York for disposition, or that respondent would handle the beans for complainant's account. Complainant refused to take the beans back or to give its consent that respondent could handle the beans for complainant's account.

7. Respondent sold the beans and rendered an account sales to complainant together with a check in the amount of \$1,083.51. Complainant returned the check and account sales to respondent, but subsequently accepted the check with the understanding that it was without prejudice to any right which complainant may have against respondent for the balance of the price.

8. The formal complaint was filed on June 21, 1949, which was within 9 months from the time the alleged cause of action accrued.

### CONCLUSIONS

It appears that the only issue in this case relates to the terms of the purchase and sale. Complainant alleges in its complaint that these beans were purchased after a personal examination and inspection by respondent's buying agents and on an f. o. b. shipping point basis. Respondent alleged in its answer that the beans were purchased upon an express warranty made by complainant that the beans would arrive in New York in sound condition, and if they did not arrive in a sound condition, respondent was to be allowed to turn the shipment over to complainant in New York and respondent would be relieved from any and all obligations in connection with the transaction. Complainant's position is supported by the sworn statements of Julius Dingfelder, who handled the transaction for complainant, and Jack Holloway, packing house foreman for complainant at Zellwood, Florida, while respondent has submitted the affidavits of its buying agents, Roy F. Symes, Jr., and Samuel Senter. In view of the conflicting statements of these persons, the issues must be determined largely upon the basis of the documentary evidence, plus an examination of the actions of the parties and the circumstances surrounding the transaction.

In complainant's opening statement of facts, which is signed by Julius Dingfelder, it is stated that Roy Symes and Samuel Senter appeared at complainant's Zellwood, Florida, packing house and opened a discussion with reference to a truckload of beans which was then being machine-graded and loaded; that while watching and inspecting the beans as they are graded and loaded, Senter "pleaded with much pressure" that complainant sell this truckload of beans to respondent; that Senter was told the truck was being loaded for complainant's New York firm, but that after considerable discussion and argument about the price of the beans, Julius Dingfelder, finally agreed to sell the truckload of beans to respondent at \$2.90; and that Senter made a statement at the time to the effect that, "If you will sell me these beans at \$2.90, that will be the last you will hear from them." None of this is denied by respondent. In fact, it is admitted by both Symes and Senter in their affidavits that they inspected the beans at complainant's packing house. They stated further that they saw rotten ends on "a great many" of the beans being loaded. If that were true, it is not likely that Dingfelder, as a reasonable business-man would guarantee sound arrival of a truckload of beans in that condition to be shipped from Florida to New York; particularly when complainant could have shipped the beans, as it had intended doing, to its New York firm with every confidence that everything would be done for complainant's best interests.



It is also stated by Dingfelder, and is not denied by respondent, that after the terms of the contract were agreed upon, Samuel Senter apparently was dissatisfied with the manner of loading and instructed that the beans that had already been loaded be unloaded, and then reloaded, in accordance with his particular directions; that Senter remained at the packing house until all of the beans had been graded, packed, and loaded on the truck, and then noted on the bill of lading, in his own handwriting, instructions to respondent with reference to payment of the driver, refrigeration, taxes, license number of the truck, driver's name, and owner's name and residence. These detailed instructions and Senter's assumption of control over the shipment at that point raise considerable doubt that any express warranty had been made by the seller.

In the case of *Fruit Dispatch v. C. C. Taft Company*, 197 N. W. 302, where a buyer bought bananas, knowing that they were ripening at point of shipment and were not standard quality, it was held that, where a dealer bought a perishable commodity in which he had habitually dealt, fully understanding that what he was buying was not in first class condition and had, in some degree, the very defect of which he later complained, there was no warranty of value or quality under such circumstances. In the light of all the circumstances surrounding the transaction, it is concluded that this was a purchase and sale after inspection by respondent's agents, with no express warranty of sound arrival by complainant. Respondent was bound by the inspection of its agents, who have admitted a knowledge of the condition of the beans at the time of purchase. *Central State Banana Company v. V. L. Pelphrey*, 8 A. D. 56.

In its opening statement of facts, complainant for the first time stated that the beans were sold to respondent upon the basis of "f. o. b. shipping point acceptance." In view of the conclusions hereinbefore reached, it is unnecessary to make any finding concerning this alleged feature of the transaction.

Respondent's failure to pay the full purchase price for the beans was a violation of section 2 of the act. Complainant should be awarded reparation for the balance of the purchase price, with interest, and the facts should be published.

#### ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$488.29, with interest thereon at the rate of 5 percent per annum from November 5, 1948, until paid.

The facts as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2425)

**EGYPTIAN NURSERY & LANDSCAPE COMPANY v. A. N. BEARMAN. PACA**  
Doc. No. 5309. Decided April 24, 1950.**Failure to Pay Purchase Price—Default**

Where complainant alleged that respondent purchased a carload of apples but failed to pay the agreed purchase price, and where respondent failed to file an answer, held, respondent's failure to answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, and his failure to pay the purchase price is in violation of the act for which reparation should be awarded complainant in the amount of the purchase price, with interest.\*

*Mr. Leo H. Graves, of Farina, Illinois, complainant pro se. Mr. E. D. Mulville, Presiding Officer.*

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Informal complaint was received November 16, 1949. Formal complaint was filed January 26, 1950, alleging that complainant sold a carload of apples to respondent on or about September 4, 1949, but that respondent failed to pay the agreed purchase price of \$1,003.20, or any part thereof. A copy of the report of investigation made by the Fruit and Vegetable Branch was served upon complainant February 11, 1950. On the same date, copies of the report of investigation and the formal complaint were served upon respondent.

At the time of service of the formal complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint and a waiver of oral hearing. Although respondent did not request an extension of time for filing an answer, the Regulatory Division of the Fruit and Vegetable Branch wrote respondent on March 1, 1950, again advising of the necessity of filing a formal answer. The Regulatory Division sent to respondent another letter dated March 8, 1950, extending the time for filing an answer to March 22, 1950, and informing respondent that if a formal answer was not filed, he would be considered as in default and an order would be issued accordingly. Respondent has failed to file an answer

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

and this proceeding is disposed of on the basis of the formal complaint and the report of investigation.

### FINDINGS OF FACT

1. Complainant is an individual, Leo H. Graves, trading as Egyptian Nursery & Landscape Company, whose address is Farina, Illinois.

2. Respondent is an individual, A. N. Bearman, whose address is 849 Plymouth Building, Minneapolis, Minnesota. At the time of the transaction complained of herein, respondent was licensed under the act.

3. On or about September 4, 1949, complainant contracted to sell to respondent 528 bushels of No. 1 Jonathan apples, size  $2\frac{1}{4}$ " and up at \$1.90 per bushel, or a total purchase price of \$1,003.20, f. o. b. Farina, Illinois.

4. On or about September 7, 1949, apples which met the contract specifications, as evidenced by an official inspection certificate, were shipped in interstate commerce in car MDT 9385 from Farina, Illinois, to respondent in Minneapolis, Minnesota.

5. Upon arrival of the shipment at destination, respondent accepted the apples but has not paid to complainant the agreed purchase price of \$1,003.20, or any part thereof.

6. Formal complaint was filed within nine months after the cause of action accrued.

### CONCLUSIONS

Failure of respondent to file an answer to the formal complaint constitutes an admission of the facts alleged therein and a waiver of oral hearing, as provided for in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that complainant contracted to sell to respondent a carload of apples for an agreed purchase price of \$1,003.20; that apples meeting contract requirements were shipped in interstate commerce to respondent and accepted by respondent; but that respondent has not paid the purchase price or any part thereof.

Respondent's failure to pay the agreed purchase price is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$1,003.20, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$1,003.20, with interest thereon at the rate of 5 percent per annum from October 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2426)

AARON ROSENTHAL v. BOSTON TOMATO COMPANY, INC. PACA Doc.  
No. 4803. Decided April 24, 1950.

**Failure to Pay Purchase Price—Effect of Purchase after Inspection**

Where complainant sold Mexican tomatoes to respondent who accepted delivery after its buyers had an opportunity for unrestricted inspection and without relying upon any warranty but thereafter refused to pay the purchase price because of an alleged loss from *Macrosporium* rot, complainant should be awarded reparation in the sum of the full contract purchase price.\*

**Implied Warranty—Reliance Upon Seller's Skill or Judgment—Evidence**

An implied warranty concerning quality or condition exists when circumstances of the sale disclose evidence that the buyer had reason to and did in fact rely upon the skill or judgment of the seller.\*

*Mr. Irving Coopersmith*, of New York, New York, for complainant. *Mr. D. Jerome Donovan*, of Boston, Massachusetts, for respondent. *Mr. John T. Pearson*, Presiding Officer.

*Decisoon by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*), instituted for the recovery of the contract purchase price of a truck-load of tomatoes accepted but not paid for by respondent. Informal complaint was made to the Regulatory Division, Fruit and Vegetable Branch, on March 4, 1947. Formal complaint was filed on August 12, 1947. A copy of the report of investigation made by the Department was served on complainant's attorney on August 22, 1947. On the following day, a copy of the formal complaint and a copy of the report of investigation were served on respondent.

On September 8, 1947, respondent filed an answer admitting the purchase of the tomatoes as alleged in the complaint but contending that they were rendered worthless by "a latent disease" not apparent at the time of purchase. By way of counterclaim, respondent alleged that complainant is indebted to respondent in the amount of the difference in value between sound tomatoes and those delivered to respondent "less the complainant's invoice price not paid by the respondent." On September 19, 1947, complainant filed a reply to the answer and

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

counterclaim denying any liability to respondent. On November 19, 1947 respondent filed a motion to amend its answer to show that the complainant expressly warranted that the tomatoes "are sound and would ripen alright." This allegation was denied by a reply filed by complainant on December 22, 1947.

A hearing was held at Boston, Massachusetts, on October 7, 1949, at which both parties were represented by counsel who filed briefs subsequent to the hearing. Complainant's testimony in this proceeding consists of the depositions of three witnesses. Two witnesses testified at the hearing for respondent.

#### FINDINGS OF FACT

1. Complainant, Aaron Rosenthal, is an individual whose post office address is 308 Washington Street, New York, New York.

2. Respondent, Boston Tomato Company, Inc., is a corporation whose post office address is 40 Commercial Street, Boston, Massachusetts. At the time of the transaction involved herein, respondent was licensed under the act.

3. On February 26, 1947, the parties to this proceeding entered into an oral agreement whereby respondent contracted in interstate commerce to purchase, after inspection by its buying broker, and complainant, as a commission merchant for the Riley-McFarland Company of Chicago, Illinois, and the Ernest E. Fadler Company of Kansas City, Missouri, contracted to sell 550 lugs of Mexican tomatoes at the agreed price of \$3.50 per lug plus a service charge of six cents per lug or \$1,958 for the lot, payable within ten days after making the purchase.

4. At the time of negotiating the sale involved in this proceeding, complainant made no representations or warranties regarding the soundness of the tomatoes; their fitness for any particular purpose either at the time of sale or when ripe and respondent's buyers did not rely upon any such express or implied representations or warranties by complainant. When this sale was negotiated, the tomatoes were stored in the tomato section of Pennsylvania Pier 28, New York, New York, where they were placed after having been unloaded from car PFE 44695 in which shipment had been made from Mexico.

5. Respondent took delivery of the tomatoes involved in this proceeding at New York, New York, and transported them by truck in interstate commerce to its repacking plant in Boston, Massachusetts, where the shipment arrived on the morning of February 27, 1947. Two days later respondent repacked and sold three lots of one thousand pounds each to customers who subsequently complained of the condition of the tomatoes but two of these buyers paid respondent the

full invoice price for the tomatoes which they had purchased. Respondent received net proceeds of \$6.80 from the third purchaser, and on March 3 notified complainant of the deteriorated condition of the tomatoes but complainant refused to accept the return of any of the tomatoes or to grant any allowance on them. Respondent has paid complainant nothing for the tomatoes involved in this proceeding.

6. A certificate of inspection of 278 lugs of Charles Brand Mexican tomatoes for condition only which was made by the National Perishable Inspection Service, Inc., at respondent's place of business in Boston, Massachusetts, on March 3, 1947, discloses that the tomatoes, which respondent claims were from the lot purchased from complainant, showed an average of 87 percent decay, mostly *Macrosporium* rot in all stages of development. A certificate of Federal inspection of 275 lugs from the same lot of Mexican tomatoes for condition only which was made at respondent's place of business on March 4, 1947, discloses an average of approximately 70 percent decay, chiefly *Macrosporium* rot in various stages.

7. On March 5, 1947, the Food Inspection Division of the Health Department, City of Boston, Massachusetts, seized and condemned 400 lugs of Mexican tomatoes which were then in respondent's possession and which were described as "Charles Brand, grown and packed in Mexico."

8. Formal complaint was filed on August 12, 1947, which was within nine months after the cause of action accrued. Respondent's counterclaim was filed on September 8, 1947.

### CONCLUSIONS

It is respondent's position that complainant not only breached his express warranty but is responsible as well for the implied warranty that the tomatoes would ripen properly and be suitable for resale.

Respondent's sole evidence of the alleged express warranty consists of the testimony of Salvatore J. Silvestro. When asked on cross-examination exactly what complainant said, this witness replied:

"He said they're the finest tomatoes grown in Mexico and he would guarantee they would carry good and come out all right."

In his deposition testimony, complainant denied making any representation or warranty at the time of sale. Complainant's version is supported by other evidence of record. The "SOLD" card which indicates the tomatoes were received in good order and a copy of the "Constitution and By-Laws of the Fruit and Produce Trade Association of New York" were received in evidence as complainant's

exhibits Nos. 2 and 9, respectively. The "SOLD" card contains the following provision:

"The merchandise involved in this transaction is sold subject to the conditions of Article XI, Sections 2 and 3 of the rules of the Fruit and Produce Trade Association of N. Y."

Section 2 of Article XI, entitled "Rules of Sale," as set forth in complainant's Exhibit No. 9, provides that:

"All goods sold in the New York Market whether on Dock, in Store or elsewhere are subject to inspection of intending purchaser. Sales are not made from sample and after delivery is taken the return of the goods will not be allowed or accepted, neither will any allowances be made to the purchaser either for condition, quantity or quality after delivery is taken."

In addition to the foregoing, deposition witnesses Hyman Shofel and Benjamin Eckstein testified that they purchased tomatoes from complainant out of car PFE 44695 on the same morning respondent made its purchase. Both testified that no complaints were received on the tomatoes which were resold at a profit. On cross-examination, Shofel testified that he did not ask the complainant for a warranty that the tomatoes "would ripen alright." With respect to asking for a warranty, this witness stated: "It is not customary and is never done by dealer to dealer."

The complainant acted as a commission merchant in this transaction. It is difficult to believe that while acting in such capacity and with only customary brokerage to be realized, complainant would give an express warranty to respondent's representatives who inspected the produce. Finally, we deem it significant that no mention was made of the claimed express warranty until approximately nine months after the dispute arose between the parties. This defense was not raised during the course of the investigation conducted by the Department which included interviews with respondent's representatives, Scott and Silvestro, as well as respondent's attorney. The defense was not asserted in the formal answer filed September 8, 1947. It appeared for the first time in the amended answer filed November 19, 1947. Considering the materiality which respondent now attaches to the alleged oral representation, it is incredible that respondent would have remained silent for so long a period if in fact complainant had guaranteed the tomatoes were sound and would ripen all right.

Upon consideration of the entire record, it is concluded that respondent has failed to sustain the burden of proving the express warranty claimed.

We believe the question of implied warranty is resolved by the conclusions reached in *Fleischer Bros. & Danzinger, Inc. v. Horowitz*

& *Grill*, 8 A. D. 927, decided August 23, 1949, and four companion cases decided the same day, 8 A. D. 934, 941, 948 and 955. These cases are similar to the present one in that the law of the State of New York is applicable and the alleged implied warranty relates to sales of tomatoes made for the purpose of ripening, repacking and reselling for human consumption. We pointed out in those cases that under the law there is no implied warranty except where the buyer makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment. Section 96 of the Personal Property Law of New York (Baldwin's New York Consolidated Laws Annotated—1938).

In the present proceeding, the record shows that while complainant may have known the particular purpose for which the tomatoes were required, yet respondent did not rely on the complainant's skill or judgment. Complainant testified he has been a commission merchant since 1944. Respondent Salvatore J. Silvestro testified that he has been buying tomatoes for 20 years; that with respect to ripening of tomatoes he considered himself an expert; and, that he felt he knew as much about tomatoes as any other dealer in the business. It seems clear from this testimony that Silvestro unquestionably possessed a higher degree of skill and judgment in determining whether the tomatoes were defective, latent or otherwise. The evidence also shows that respondent's representatives had full opportunity to inspect the tomatoes which were in the presence of the parties at the time of sale. Since respondent did not rely on complainant's skill or judgment in selecting suitable tomatoes, it is concluded that the transaction between the parties gave rise to no warranty by implication of law and that respondent is without recourse against complainant for any loss resulting from the quality or condition of the tomatoes at a time subsequent to the purchase thereof from complainant.

Reparation should be awarded complainant for respondent's failure to pay the agreed purchase price which constitutes a violation of section 2 of the act. The counterclaim should be dismissed and the facts should be published.

### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$1,958, with interest thereon at the rate of 5 percent per annum from March 15, 1947, until paid.

Respondent's counterclaim is dismissed.

The facts as set forth herein shall be published.

Copies hereof shall be served upon the parties.



(No. 2427)

**S. A. GERRARD COMPANY v. WILLIAM F. HELM & SON. PACA Doc. No. 5187. Decided April 24, 1950.**

### **Denial of Petition for Rehearing and Reconsideration**

A petition for rehearing and reconsideration is denied where no answer has been filed, and there is no allegation of irregularity in the prior order.

### **Petition to Reopen after Default, When Granted**

A default will be reopened and respondent permitted to file an answer only for "good reason". Even though respondent's failure to answer may have been the result of excusable neglect, "good reason" is not shown where respondent does not have additional or different facts to present and it appears on the face of the submissions a hearing would not result in conclusions different from those already reached.

*The S. A. Gerrard Company, of Cincinnati, Ohio, complainant pro se. William F. Helm & Son, of Kansas City, Missouri, respondent pro se.*

*Decision by Thomas J. Flavin, Judicial Officer*

### **Order Denying Petition for Rehearing and Reconsideration, and Denying Motion to Reopen After Default**

On October 31, 1949, a decision was rendered in this proceeding and respondent was ordered to pay complainant \$1,159.94, with interest. The order was entered on the basis of respondent's default, it being evident that respondent, after notice, had failed to file an answer to the formal complaint. In accordance with the rules of practice, respondent's failure to answer constituted an admission of the allegations of the complaint and a waiver of oral hearing. The order was served on respondent on November 2, 1949. On November 9, 1949, which was within the time prescribed by the rules of practice, respondent filed an "Application for Rehearing," with attachments, and on January 23, 1950, respondent filed a "Motion to Reopen After Default and Leave to File Formal Answer," together with an answer submitted for filing.

Section 47.24 (e) of the rules of practice provides for reopening a proceeding after default upon motion made within a reasonable time after expiration of the time for filing an answer if [in the judgment of the Secretary], after notice to and consideration of the views of the other party, there is good reason for granting such relief. The documents filed by respondent were served by registered mail upon complainant on February 1, 1950, and complainant was given an opportunity to express his views with respect to setting aside the default and restoring the case to our docket. On February 9, 1950, com-

plainant filed its answer to respondent's motion to reopen. Complainant's position is that the default should not be reopened because respondent had adequate opportunity to file an answer at the proper time and there is no showing of excusable neglect.

Respondent's original petition was for rehearing and reconsideration, the procedure for which is provided by subsection 47.24 (a) of the rules of practice. Any relief available to respondent, however, lies elsewhere. It is futile to talk about rehearing, for example, when no hearing has been held; and there is no basis for a hearing without an answer having been filed and some issue raised. Reconsideration, even if granted, would be based upon the record before the Secretary. Matters to be reconsidered in this case would include the complaint and exhibits, the report of investigation, and *respondent's constructive admissions*. It is not contended that there is any irregularity in the order of October 31, 1949, based upon this record.

Respondent subsequently filed a petition to reopen after default, and requested leave to file an answer, pursuant to subsection 47.24 (e). With respect to setting aside the default, it is observed that respondent's submissions include statements of respondent's position with respect to the merits of the controversy. Whereas, some of the information of record might extenuate respondent's failure to file a formal answer, it is noted that respondent has made no effort to show that its default was due to excusable neglect. But even assuming that respondent's failure to file a formal answer were excusable, which we do not here decide, something more is necessary. Subsection 47.24 (e) of the rules of practice requires that there must be "good reason" shown for opening a case after default, and such reason is lacking if it appears on the face of the submissions that reopening after default would serve no useful purpose. Respondent's motion and grounds for reopening do not indicate that he has different or additional facts to introduce should the requested hearing be granted. Actually, respondent seems to concede the correctness of the facts presented in the record as now constituted, and it appears that respondent's defense would be based primarily upon argument as to the interpretation of those facts. In the issuance of the order of October 31, 1949, careful consideration was given to the evidence presented in the record, consisting of the attachments to the complaint and the report of investigation. It was concluded that complainant had made out a good cause of action and was entitled to reparation. Whereas, the case was disposed of on the basis of respondent's default, the order is amply supported by evidence of record, without regard to respondent's constructive admissions. Thus, without prejudging respondent's proposed answer, it seems extremely

doubtful that hearing respondent's arguments would result in a conclusion different from that already reached. If respondent had new or different evidence to introduce our decision as to reopening might be different. In this case, we think "good reason" has not been shown for a reopening of this proceeding. Accordingly, respondent's motion to reopen should be denied.

### ORDER

Respondent's petition for rehearing and reconsideration is denied.

Respondent's motion to reopen after default and leave to file formal answer is denied.

The reparation awarded in the order of October 31, 1949, shall be paid within 30 days from the date of this order.

The facts and circumstances set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2428)

**WILLIE FRADEN TOMATO CO. v. WILMINGTON PRODUCE CO. PACA**  
Doc. No. 5235. Decided April 24, 1950.

### Failure to Pay Purchase Price—Default

Where respondent failed to pay complainant for a truckload of tomatoes and also failed to file an answer to the formal complaint, held, that respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint and failure to make payment is a violation of section 2 of the act for which complainant is entitled to an award of reparation in the amount of the purchase price.\*

*Willie Fraden Tomato Co.*, of Jacksonville, Florida, complainant *pro se*. *Mr. Frederick W. Woodley*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Complainant filed an informal complaint on July 18, 1949, and a formal complaint on October 27, 1949. In the formal complaint, it is alleged that respondent failed to pay complainant the purchase price for a truckload of tomatoes sold to respondent on May 15, 1949. Reparation is requested in the amount of \$363.07.

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

A copy of the report of investigation made by the Fruit and Vegetable Branch was served by registered mail upon complainant on November 4, 1949. A copy of the formal complaint and a copy of the report of investigation were served upon respondent by registered mail on the same day.

At the time of service of the formal complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint. Respondent has failed to file an answer and this proceeding is disposed of on the basis of the facts alleged in the formal complaint and the report of investigation.

### FINDINGS OF FACT

1. Complainant is a partnership composed of Joe Fraden, Louis Fraden, and Harry Fraden, doing business as Willie Fraden Tomato Co., whose address is Jax Produce Market, West Beaver Street, Jacksonville, Florida.

2. Respondent is an individual, D. G. Granger, doing business as Wilmington Produce Co., whose address is 119 Dock Street, Wilmington, North Carolina. At the time of the transaction involved herein, respondent was licensed under the act.

3. On May 15, 1949, at Jacksonville, Florida, complainant sold to respondent a quantity of tomatoes for the total price of \$363.07, computed as follows:

Quantity	Description	Price	Amount
5	Half-crates of tomatoes.....	\$3.25	\$16.25
25	Crates of tomatoes.....	6.50	162.50
32	Cartons of tomatoes.....	5.76	184.32

4. Respondent accepted the tomatoes and transported them by truck in interstate commerce from Jacksonville, Florida, to Wilmington, North Carolina.

5. Complainant demanded payment of the purchase price. Respondent failed and refused to pay the purchase price or any part thereof.

6. The formal complaint was filed within 9 months after the cause of action accrued.

### CONCLUSIONS

The failure of respondent to file an answer to the formal complaint constitutes an admission of the facts alleged therein, as provided in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that respondent purchased from complainant a quantity of tomatoes for the agreed price of \$363.07; that respondent received and accepted the tomatoes, and transported them in interstate commerce; and that respondent failed to pay the purchase price or any part thereof.

The failure of respondent to pay promptly the agreed purchase price is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$363.07, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$363.07, with interest thereon at the rate of 5 percent per annum from June 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2429)

ERNEST E. FADLER COMPANY *v.* APACHE DISTRIBUTORS. PACA Doc. No. 4766. Decided April 26, 1950.

### Petition for Reconsideration Dismissed Where Former Order Supported by Evidence of Record and Law Applicable Thereto

Where an order was issued dismissing the complaint for failure to prove damages sustained as a result of a breach of contract, and complainant filed a petition for reconsideration of the order, setting forth matters alleged to have been erroneously decided, it is held, after a review of the record, that the original order is supported by the evidence and the law applicable thereto, and the petition is, therefore, dismissed.\*

*Mr. Warren S. Earhart*, of Kansas City, Missouri, for complainant. *Messrs. Jennings, Strouss, Salmon & Trask*, of Phoenix, Arizona, for respondent.

*Decision by Thomas J. Flavin, Judicial Officer*

### DISMISSAL OF PETITION FOR RECONSIDERATION

In this proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*), an order was issued on August 26, 1949, in which it was held that respondent breached the contract by not delivering lettuce of the warranted size, but that complainant failed to prove the amount of damages, if any, sustained as a result of such violation, and the complaint was, therefore, dismissed.

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

On September 6, 1949, and within the time provided by the rules of practice, complainant filed a petition for reconsideration of the order. In the petition, complainant sets forth certain matters which it claims were erroneously decided and other errors alleged to have been committed. Complainant takes exception to the fact that the Judicial Officer took official notice of the market reports of the Department, at the same time admitting his right to do so. Complainant contends that by "going outside the record," the Judicial Officer has considered evidence which complainant has had no opportunity to rebut. The market reports of the Department are available to complainant at all times; indeed, they are issued for the information and guidance of the trade in buying and selling perishable commodities. These reports afford one of the mediums by which complainant might have proved its damages, but of which it failed to take advantage. Complainant's objection, therefore, that we went outside the record to consider evidence which it had no opportunity to rebut is without merit.

Complainant objects because it was concluded in the order of August 26, 1949, that there was a market in Kansas City for size 5, dry-pack lettuce at the time complained of, and that complainant did not resell the lettuce in question to the best advantage. We concede complainant's point that there was no market for size 5, drypack lettuce in Kansas City. However, we are still of the opinion that the lettuce in controversy could have been sold to better advantage than the \$2 delivered price for which complainant resold it in Indianapolis. According to Market News Service reports, drypack lettuce was sold on the Chicago market as follows: March 11, 12, and 13, 1946, size 5, \$4.99; March 14 and 15, 1946, size 4—5 dozen, \$4.99; March 18, 1946, size 4—5 dozen, \$4.25—\$4.50, few \$4.75, fair quality \$4; March 19, 1946, fair quality, size 5, \$3.25—\$3.50, few best, \$4—\$4.25, poorer, \$2.50—\$2.75; March 20, size 5, \$3—\$3.25, few \$3.50. The Market News Service reports show that drypack lettuce was sold on the St. Louis market as follows: March 18, 1946, size 5, fair quality and condition, \$3.25—\$3.75; March 19 and 20, 1946, size 5, \$4.25—\$4.50, ordinary quality, \$2.75.

There was no question concerning the quality of the lettuce in the case before us. The dispute related only to size. Admitting that complainant found it necessary to ship the lettuce to another market, it appears obvious from the above quotations that complainant, or its agent, used poor judgment in making a resale of the lettuce at Indianapolis for \$2 per crate delivered. As stated in our previous order, the proper basis for awarding damages for respondent's breach of the contract would be the difference between the value of the lettuce delivered and the lettuce that should have been delivered. There is no difficulty

in determining the value of the lettuce that should have been delivered, since complainant sold the shipment in transit at Kansas City as a car of 4 dozen size. However, in view of the foregoing, we cannot accept the price for which complainant resold the lettuce at Indianapolis as the value of the lettuce at time of delivery and as proof of the damage sustained.

After a careful review of the record in this case, it is concluded that the order of August 26, 1949, is supported by the evidence and the law applicable thereto. Accordingly, complainant's petition for reconsideration is hereby dismissed.

Copies of this order shall be served upon the parties.

(No. 2430)

STEVE DART COMPANY v. MEXICAN PRODUCE COMPANY. PACA Doc. No. 4824. Decided April 26, 1950.

**Evidence—Damages—Breach of Contract—Amount Offered in Settlement**

Where, pursuant to the contract of the parties, respondent delivered to complainant a carload of tomatoes which were not in suitable shipping condition, and complainant resold the tomatoes over a 2-week period of time, held, that the evidence showing complainant was damaged by respondent's breach of contract is insufficient to prove the exact damages sustained, but since the evidence shows complainant suffered damages in the amount earlier offered by respondent in full settlement of the claim, complainant should be awarded reparation for that amount.\*

**Evidence—Lack of Suitable Shipping Condition**

Where the percentage of decay in a carload of tomatoes was excessive at destination, and transportation service and conditions were normal, it is concluded the tomatoes were not in suitable shipping condition irrespective of whether the decay was caused by disease of field origin.\*

**Damages—Failure to Deliver Commodity**

The proper measure of damages for failure to deliver tomatoes meeting contract requirements is the difference in value between tomatoes of the kind that should have been delivered and those that were delivered as of the time and place of delivery.\*

*Mr. Thomas Francis Levins*, of Montreal, Canada, for complainant. *Mr. James V. Robins*, of Nogales, Arizona, for respondent. *Mr. E. S. French*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

## PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930 (7 U. S. C. 1946 ed. 499a *et seq.*) instituted by an informal complaint filed on March 12, 1947. In the formal complaint, filed June 12, 1947, it is alleged that complainant purchased from respondent a carload of tomatoes, grading 88 percent U. S. No. 1, at a total purchase price of \$2,190.50 f. o. b. shipping point (the Mexican border). It is further alleged that respondent delivered tomatoes which failed to meet contract requirements, and that, as a result, complainant was damaged in the sum of \$3,620. This amount is alleged to be the difference between the value of a carload of tomatoes which would meet contract requirements and the market value of the shipment actually delivered.

A copy of the report of investigation made by the Regulatory Division of the Fruit and Vegetable Branch was served by registered mail on complainant on September 19, 1947. A copy of the formal complaint and a copy of the report of investigation made by the Regulatory Division were served by registered mail on respondent on September 22, 1947.

Respondent filed an answer admitting the sale of a carload of tomatoes to complainant, but denying that respondent failed to deliver tomatoes meeting contract requirements. Respondent alleges complainant purchased the tomatoes on the basis of a U. S. Government inspection certificate, and that respondent made no representation as to the grade of the tomatoes at destination (Montreal, Canada), the sale being on an f. o. b. basis. Respondent also alleges that the identical tomatoes agreed to be delivered to complainant, those contained in car PFE 31331, were actually delivered to complainant. Respondent denies any liability to complainant, and alleges in its answer that if the tomatoes arrived in a deteriorated condition as contended by complainant, "such condition was caused by chill or freezing or improper handling by the complainant or its agents or other cause beyond respondent's control."

A hearing was held at Nogales, Arizona, on May 16, 1949, at which both parties were represented by counsel. Leo Klein, complainant's Secretary-Treasurer, testified on behalf of complainant and the testimony of complainant's deposition witnesses, J. Demers, L. Warrington, and J. L. Townshend, was included with complainant's evidence in the record. The testimony for respondent was offered by its president, Walter Holm.



## FINDINGS OF FACT

1. Complainant, Steve Dart Company, is a corporation whose post office address is 1665 Trundel Avenue, Montreal, Quebec, Canada.

2. Respondent, Mexican Produce Company, is a corporation whose post office address is Post Office Box 590, Nogales, Arizona. At the time of the transaction involved herein, respondent was licensed under the act.

3. On or about January 14, 1947, in the course of interstate and foreign commerce, the parties entered into an agreement for the sale by respondent to complainant of 910 lugs of 88 percent U. S. No. 1, Chiquita brand, Mexican grown tomatoes, then rolling in car PFE 31331. The tomatoes had been shipped from Navojoa, Sonora, Mexico, on January 7, 1947, and crossed the border on or about the day of sale. This sale was negotiated by George L. Hendry, a broker of Montreal, Quebec, Canada, at the agreed price of \$2.50 per lug for 650 lugs of the 6 x 7 size, and \$2 per lug for 260 lugs of the 7 x 7 size, plus 5 cents per lug crossing charge on the 910 lugs in the carload, or a total of \$2,190.50 f. o. b. shipping point. The total purchase price was paid by complainant to respondent.

4. A U. S. Federal certificate of inspection covering the top layer lugs of the shipment at Nogales, Sonora, Mexico, on January 13, 1947, shows that the tomatoes in car PFE 31331 were "approximately 77% mature green, 15% turning, and 8% firm ripe; \* \* \* no decay," and graded 88 percent U. S. No. 1 quality. On or about January 14, 1947, the shipment was diverted from Nogales, Arizona, to complainant at Montreal, Quebec, Canada, where it arrived at 8:25 p. m. on January 23, 1947. The car moved under normal transportation service and conditions. This car was placed for unloading at 2:30 a. m. on the following day and was promptly unloaded into a terminal warehouse where an inspection for condition was immediately made by the Canadian Department of Agriculture inspection service. The certificate of this inspection shows that it was made at 9 a. m. on January 24, 1947, and states "Of tomatoes free from decay: 22% mature green, 23% turning, 33% ripe and firm, 22% ripe and soft. Decay ranges from 6% to 53% average 24% (soft rot)."

5. Complainant resold 386 lugs of tomatoes from the shipment on January 24, 1947; 91 lugs on January 25; and 185 lugs on January 27, 1947. The remaining 203 lugs were resold between January 28 and February 7, 1947. Forty-three lugs of tomatoes were lost in repacking and two lugs are eliminated from complainant's record of sales with a notation of "no charge." Net proceeds of \$930 were received by complainant on the resales.

6. Formal complaint was filed on June 12, 1947, which was within 9 months after the cause of action accrued.

### CONCLUSIONS

The contract of sale in this case called for tomatoes grading 88 percent U. S. No. 1 and was made on an f. o. b. shipping point basis. The tomatoes were therefore required to be in suitable shipping condition. Regulations, Sec. 46.24 (i), (j), and (k). A certificate of Federal inspection which was made at Nogales, Sonora, Mexico, on January 13, 1947, restricted to the top layer of the load, shows that the tomatoes then averaged approximately 88 percent U. S. No. 1 quality with no decay. The shipment was in transit from very soon after the time when this inspection was made on January 13, 1947, until it arrived at Montreal, Quebec, Canada, on January 23, 1947. This is a normal period of time for the distance traveled. Also, the transportation service and conditions under which the shipment traveled appear to have been normal. A certificate of inspection for condition made by the Canadian inspection service at 9 a. m. on January 24, 1947, at Montreal disclosed decay ranging from 6 percent to 53 percent, averaging 24 percent. This certificate also states that the decay was "soft rot." After analysis of samples taken from the shipment in question approximately 3 weeks later, Professor John G. Coulson of MacDonald College, Quebec, Canada, made a report disclosing that, in his opinion, the decay was occasioned largely, if not entirely, by *Alternaria* rot which, he states, is due to a fungus growth of field origin. Respondent suggested that the tomatoes may have been overheated or chilled en route, but there is no proof as to this. Irrespective of whether the decay was caused by a disease of field origin, the high percentage of decay on arrival, where the transportation service and conditions were normal, leads us to the conclusion that the tomatoes were not in suitable shipping condition at the time of sale by respondent to complainant. *Accord, Cayuga Producers Cooperative, Inc. v. Krotzki Farm Products*, 8 A. D. 287.

Since the tomatoes in question were not in suitable shipping condition, respondent is in violation of section 2 of the act, and is liable to complainant for any damages which can be shown to have resulted from the breach. *Cayuga Producers Cooperative, Inc. v. Krotzki Farm Products, supra*. The proper measure of damages in such case is the difference in value between tomatoes of the kind that should have been delivered and those actually delivered *as of the time and place of delivery*. *The Auster Co. et al. v. Watson Co.*, 8 A. D. 798, 803.

Although it is reasonably clear that complainant was damaged by respondent's failure to deliver tomatoes which were in suitable ship-

ping condition, the evidence is insufficient to show the extent of such damage. Complainant's evidence on this point consists only of an account sales. This account sales shows that of the 910 lugs of tomatoes comprising the shipment, 386 lugs were sold on January 24; 91 lugs were sold on January 25; and 185 lugs were sold on January 27. Resales of the remaining 203 lugs of tomatoes were made between January 28 and February 7, 1947 [43 lugs were lost in repacking and on 2 there was "no charge"]. The sales in all covered a period of some 14 days. During this time the tomatoes undoubtedly deteriorated further. Because of the period of time which elapsed between arrival of the shipment and final resales, we think that evidence as to the amount of proceeds received from these resales cannot be considered as accurately reflecting the value of the tomatoes at the time of arrival at destination. *Federal Fruit and Produce Co. v. Price Distributing Co.*, PACA Docket No. 4925, decided January 4, 1950.

Considering further the question of damages, the Canadian certificate of inspection made at Montreal on January 24, 1947, indicates that decay of the tomatoes then ranged "from 6% to 53% average 24% (soft rot)." Upon the premise that approximately 24 percent of the tomatoes were of little or no commercial value, and that if they had met contract requirements they would have been worth at least \$5 per lug, as evidenced by the Dominion Department of Agriculture Marketing Service Report for Montreal for the week ending January 25, 1947, then it would appear that complainant suffered a loss of approximately \$1,092. This, of course, is not the proper method of assessing damages in a case of this kind, and probably does not reflect complainant's entire loss. The computation, however, does serve to show that, upon the evidence of record, complainant suffered damages of at least this amount. In the early stages of this controversy, and prior to March 1, 1947, respondent offered half of the invoice price (or \$1,095.25) in full settlement of the claim. This offer was rejected. Since the evidence shows complainant suffered a loss of at least \$1,092, and respondent at one time offered almost the identical amount in settlement of the claim, we think that, instead of dismissing the complaint for lack of proof as to the exact amount of damages suffered, complainant should be awarded reparation in the amount of \$1,092. The facts should be published.

#### ORDER

Within 30 days from the date hereof respondent shall pay to complainant, as reparation, \$1,092, with interest thereon at the rate of 5 percent per annum from February 1, 1947, until paid.

The facts and circumstances set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2431)

MURRAY GRISS *v.* GILLILAND & COMPANY. PACA Doc. No. 5139.  
Decided April 28, 1950.

**Failure to Pay Purchase Price—Evidence—Burden of Proof of  
Affirmative Defense**

Where respondent alleged, as a defense to a complaint against it to recover the unpaid balance of the purchase price of a shipment of apples, that complainant contracted to sell to respondent apples of Extra Fancy and Fancy grade and that a new contract was entered whereby complainant authorized respondent to sell the apples for complainant's account, it is held, that the burden is on respondent to show the grade alleged was part of the contract of purchase and sale and that a new contract was entered and that since respondent has failed to support its defense, complainant is entitled to an award of reparation in the amount of purchase price.\*

*Mr. Lloyd M. Barrett*, of Burges, Scott, Rasberry & Hulse, of El Paso, Texas, and *Mr. J. L. Nellis*, of Washington, D. C., for complainant. *Mr. David J. Smith*, of El Paso, Texas, for respondent. *Mr. William A. Bolding*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*), and was instituted by the filing of a complaint by complainant alleging failure on the part of respondent to pay the full purchase price for a truckload of apples shipped from California to Texas on or about September 18, 1948. An informal complaint was received October 19, 1948, and a formal complaint was received May 10, 1949. An investigation was made by the Department and a copy of the report of investigation was served upon complainant's attorney May 26, 1949. Copies of the report of investigation and the formal complaint were served upon respondent on May 30, 1949.

Respondent filed an answer June 16, 1949, claiming that the apples received were not of the grade and quality contracted for; that respondent notified the complainant within 24 hours after the apples arrived that respondent would not accept the apples; that complainant requested respondent to accept the apples as complainant would make an allowance for any loss sustained; and that relying on this subsequent agreement respondent sold the apples and has correctly accounted to complainant for all the proceeds of such sales.

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

A hearing was held at El Paso, Texas, on November 1, 1949. Both parties were represented by counsel. Murray Griss, the complainant, testified in his own behalf. W. A. Wunsch, supervisor of New Mexico Fruit and Vegetable Standards, Miles E. Dart, an employee of respondent company and Craig Gilliland, Jr., a partner of respondent's firm, testified for respondent. The deposition of Mathew Mello, County Agricultural Commissioner of Santa Cruz County, California, was introduced in evidence for complainant. Complainant filed a brief November 28, 1949.

### FINDINGS OF FACT

1. Complainant is an individual, Murray Griss, whose address is P. O. Box 387, Salinas, California.

2. Respondent is a partnership composed of Craig Gilliland, Sr., and Craig Gilliland, Jr., trading as Gilliland & Company, whose address is Ochoa and Overland Streets, El Paso, Texas. At the time of the transaction complained of herein, respondent was licensed under the act.

3. On or about September 16, 1948, complainant as a buying broker and upon the request of respondent purchased for respondent 833 boxes of Watsonville, California, Red Delicious Apples at the agreed price to the respondent, f. o. b. Watsonville, California, of  $11\frac{1}{2}\text{¢}$  per pound for 4 tier (size) and 9¢ per pound for  $4\frac{1}{2}$  tier (size), the invoice price being \$3,435.52.

4. On September 18, 1948, complainant delivered to respondent's contract carrier 833 boxes of apples which according to State Inspection Report were Delicious-Double Red Apples with the remark "OK" which mean that the defects were within tolerance. The apples arrived at respondent's place of business early in the morning of September 20, 1948. Invoice of Sale issued Monday, September 20, 1948, and forwarded to respondent, was the only written memorandum introduced and shows the description of products, terms and price as follows:

**609 Boxes 4 Tier D. R. Delicious**

Gross Weight	-----	#26442	
Tare	-----	2350	

Net weight	-----	23092	at $11\frac{1}{2}$ cents	\$2655. 58
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**224 Boxes  $4\frac{1}{2}$  Tier D. R. Delicious**

Gross Weight	-----	9898	
Tare	-----	1232	

Net weight	-----	8666	at 9 cents	779. 94
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Airmail check	-----			\$3435. 52
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This invoice shows a discrepancy in the weight figures of the 4 tier apples but the sum of the net weight at the agreed price together with that for the 4½ tier apples corresponds with the contract price.

5. The apples were shipped by truck, hired by respondent, in interstate commerce from Watsonville, California, to El Paso, Texas, and respondent accepted the produce upon arrival.

6. Respondent paid complainant \$1,456.95 which was accepted by complainant as part payment on the purchase price of the apples but respondent has failed to pay the unpaid balance of \$1,978.57.

7. Informal complaint was filed with the Regulatory Division on October 19, 1948, and within nine months after the cause of action accrued.

### CONCLUSIONS

Complainant as a buying broker and as agent of respondent located and obtained for respondent at respondent's request 833 boxes of Watsonville Double Red Delicious apples at an agreed price basis f. o. b. shipping point Watsonville, California.

The controversy in this case revolves around the contract terms with respect to the grade of apples purchased. The complainant contends that no grade was specified and that he informed respondent that the seller was labeling the apples "Combination Fancy and C Grade". Respondent in its answer states that complainant advised respondent that the apples were "Extra Fancy and Fancy." The contract was consummated by telephone without written confirmation and it is difficult to determine which version is correct. The invoice of sale, however, dated September 20, 1948, forwarded to the respondent made no mention of grade or quality other than "D. R. Delicious" and complainant's letter of September 22, 1948, in reference to respondent's telephone conversation reaffirms complainant's understanding that the contract called for "Double Red Delicious" apples without mentioning grades. Furthermore, the shipment of apples was accepted by the respondent.

The respondent explains its acceptance of the apples on the ground that a new contract was entered into September 20, 1948, whereby complainant agreed to allow the respondent to sell the apples for complainant's account. No written confirmation was made or offered to prove the existence of such an arrangement except a telegram dated 22 days after the alleged agreement and it is difficult to understand why a buyer of apples having been, as he claims, relieved of liability by an arrangement between the parties would wait 22 days before confirming the new arrangement. We note that respondent's letter to the United States Department of Agriculture dated November 12, 1948, quotes complainant as saying to the respondent on or about

September 23, 1948, "The apples are yours, you bought them f. o. b. and that's all there is to it. I expect payment in full." This confirms the view that no new agreement was reached September 20, 1948.

It is concluded, therefore, that the respondent purchased the shipment in reliance upon inspection made by complainant acting as his agent. Complainant paid for the apples and delivered them to respondent's carrier in accordance with contract, then invoiced respondent accordingly. Title to the apples passed to respondent at the time of delivery to his carrier at Watsonville, California. Respondent has failed to support its defense that the contract called for a specific grade or quality, nor has respondent established that a new contract was entered into whereby complainant authorized respondent to sell the apples for complainant's account.

Respondent's failure to pay complainant the full amount of the contract purchase price of \$3,435.52, for the shipment of the truckload of apples involved in this proceeding was in violation of Section 2 of the act, which violation caused complainant damages in the amount of \$1,978.57. Reparation, plus interest, should be awarded accordingly. The facts should be published.

#### ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$1,978.57, with interest thereon at the rate of five per cent per annum from October 1, 1948, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2432)

PACA Doc. No. 5222.\* Decided April 28, 1950.

#### Dismissal—Failure to Prove Breach of Warranty—Delivered Sale

Where complainant contends potatoes purchased from respondent on delivered basis were not up to the grades warranted and that respondent agreed to protect complainant against any loss sustained on resorting the potatoes, held, that complainant failed to show the potatoes were not of the grades warranted at the time of delivery and, therefore, the complaint should be dismissed.\*\*

*Mr. Warfield Z. Miller*, of Richmond, Kentucky, for complainant. *Mr. R. W. Gudgeon* and *Mr. LeRoy W. Gudgeon*, of Chicago, Illinois, for respondent. *Mr. Frederick W. Woodley*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

\*As explained in Prefatory Note, the identities of the parties are not disclosed.—Ed.

\*\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). An informal complaint was filed on behalf of complainant on May 5, 1949. Complainant filed a formal complaint on August 29, 1949, alleging that on or about September 13, 1948, it contracted to purchase from respondent a carload of Idaho Russett potatoes at a total price of \$1,413, delivered at \* \* \*. Complainant alleges further that the potatoes received were not in accordance with contract requirements and that it sustained damages in the amount of \$284.90, being the difference between the market value of potatoes of the grades warranted and the value of those actually received. Reparation is requested for this amount.

A copy of the report of investigation made by the Fruit and Vegetable Branch of the Department was served by registered mail upon complainant on October 22, 1949. A copy of the report of investigation and a copy of the formal complaint were served by registered mail upon respondent on October 21, 1949.

An answer to the formal complaint was filed on November 21, 1949. Respondent admits that the contract was as set forth in the complaint, but denies that the potatoes failed to meet the contract specifications and denies that complainant sustained any loss by reason of any action on the part of respondent.

Since the amount in controversy in this proceeding is less than \$500, the shortened method of procedure has been used in accordance with section 47.20 of the rules of practice (7 CFR Part 47). The parties rely solely upon their verified pleadings and attached exhibits.

**FINDINGS OF FACT**

1. Complainant, \* \* \*, is a partnership composed of \* \* \*, whose address is \* \* \*.

2. Respondent, \* \* \*, is a partnership composed of \* \* \*, whose address is \* \* \*. At the time of the transaction involved herein, respondent was licensed under the act.

3. On September 13, 1948, the two parties entered into a contract for the sale by respondent to complainant of a carload of Idaho Russett potatoes. Respondent represented that the potatoes had been shipped from Idaho on September 11, 1948, in car ART 23628; and that the car contained 210 sacks of grade U. S. No. 1, Size A, washed, and 150 sacks of grade U. S. No. 2. The agreed prices were \$4.30 per sack for the potatoes grading U. S. No. 1 and \$3.40 each for those grading U. S. No. 2, or a total price of \$1,413, delivered at \* \* \*.



4. Car ART 23628 was shipped from \* \* \* on September 11, 1948. The potatoes therein were inspected on the same day, prior to shipment, and 210 sacks were certified as grade U. S. No. 1, Size A, and 150 sacks were certified "Idaho Utility, also meets the requirements of U. S. No. 2, Size A 2 inches minimum." The Federal certificate states as to quality and condition:

"Firm mostly moderately, many badly skinned, washed, generally clean. U. S. No. 1 mostly fairly well, many well shaped. Idaho Utility consisting mostly of worm damage, clipped and misshapen potatoes. No soft rot. Grade defects within tolerance."

5. The shipment arrived at \* \* \*, at 10 a. m., September 18, 1948, and the carrier gave complainant notice of arrival at 1 p. m., the same day. Unloading was begun by complainant on Monday, September 20, 1948, and was completed the next morning. Complainant sent to respondent the following telegram dated September 20:

"WE UNLOADED AND INSPECTED PART OF POTATOES TOO MANY BAD ONES PLEASE ADVISE."

Respondent's telegram sent September 21 in reply reads:

"ANSWERING ART 23628 GET GOVERNMENT AND EQUIPMENT INSPECTION WILL PROTECT SHRINKAGE AND LABOR GO EASY AS POSSIBLE AS WORKING VERY CLOSE THANKS."

6. Complainant did not have the potatoes officially inspected at Richmond.

7. Complainant paid the carrier freight charges totaling \$527.61, leaving a balance due respondent of \$885.39. This net amount was paid in full to respondent.

8. The informal complaint was filed within nine months after the cause of action accrued.

### CONCLUSIONS

In the formal complaint, complainant alleges that respondent contracted to sell complainant 210 sacks of Idaho Russet potatoes, grade U. S. No. 1, Size A, washed, and 150 sacks grading U. S. No. 2, at \$4.30 and \$3.40 per sack, respectively, delivered at \* \* \*. It is alleged further that the potatoes failed to meet the contract requirements; that on September 20, 1948, when the potatoes were unloaded into storage, complainant noticed a few sacks with small spots but considered this inconsequential; that a few sacks sold to customers on September 20 and 21 were examined and the potatoes in the center of the sacks were moldy and rotten; and that complainant sorted three sacks and salvaged only 30 pounds and later sorted four more bags and 15 pounds were salvaged. Complainant alleges further

that the condition of the potatoes arose from the fact that they were too green when shipped.

In the formal answer, respondent alleges that it relied upon the Federal inspection certificate issued at the shipping point and, therefore, warranted the potatoes when shipped to be of the grade certified. In addition, respondent alleges that, by the telegram dated September 21, 1948, it put complainant on notice that Federal and equipment inspections were to be obtained before protection against any loss would be granted by respondent.

The invoice and confirming telegram sent by respondent to complainant express a sale on a "delivered" basis by reason of the use of such term. Section 46.24 (p) of the Regulations (7 CFR Part 46), prescribes, in effect, that, with respect to a "delivered sale," the produce shall at the agreed destination meet the requirements of the grade specified in the contract. *Anonymous*, 8 A. D. 257, 259. It is concluded that the contract involved herein was on a delivered basis, and, therefore, the potatoes at the time of delivery at \* \* \*, were required to be of the grade specified.

The U. S. Standards for Potatoes (7 CFR 51.366) provides a tolerance for defects in the U. S. No. 1 and U. S. No. 2 grades as follows:

"In order to allow for variations other than size, incident to proper grading and handling, not more than 6 percent of the potatoes in any container may be below the requirements of the grade but not to exceed one-sixth of this amount, or 1 percent, shall be allowed for potatoes affected by soft rot or wet breakdown. In addition, not more than 5 percent may be seriously damaged by hollow heart and internal discoloration."

To show the condition of the potatoes received, complainant submitted as a part of the formal complaint a "Car Load Perishable Inspection Report" issued by the Louisville & Nashville R. R. Co. The report states that \* \* \* was notified of the arrival of car 23628 by telephone at 1 p. m. September 18, 1948, and that unloading began on September 20 and was completed at 10 a. m. the following day. It further appears that \* \* \* made complaint to the carrier as to rotten and moldy potatoes on September 22, but the carrier's inspection of the potatoes in complainant's warehouse was not made until 8 a. m. September 25. The inspector made the following remarks, "The bags that I examined were the worst I have ever run across," and "do not think would have helped any if had seen them the first thing as they appear to go to the bad as soon as they stay out in the open for a while and the warm air strikes them."

During the investigation of the informal complaint, the Fruit and Vegetable Branch, by letter dated May 11, 1949, requested complainant to submit detailed information with respect to the loss claimed. A

photostatic copy of complainant's letter in reply is contained in the report of investigation. In this letter, dated May 19, complainant states in part as follows:

"We received 210 U. S. #1 Idaho potatoes. We reworked the lot and salvaged 74, 100# bags, and 957, 10# bags. We get ten, 10# bags from one bag of potatoes, so the 957 makes an average of 96, 100# bags. The total is 96 plus 74, or 170 bags salvaged and a loss of 40 bags of #1 Idaho.

"We received 150 bags of Idaho Utility. We reworked the whole lot and salvaged 43, 100# bags. We salvaged 741, 10# bags of 74, 100# bags. The total is 74 plus 43, or 117 bags salvaged, making a loss of 33 bags. Total loss:

40 bags #1 Idaho-----	@ \$4. 30	172. 00
33 bags Utility-----	@ 3. 40	112. 20
Total claim-----		\$284. 20

"Our regular employees worked these potatoes at no extra cost to us. That is why we made no claim for labor. We used the bags \* \* \* sent for 100# potatoes and our bags for 10# potatoes. We wanted to be fair with them because they asked us to go easy as possible."

Complainant has the burden of proving by a preponderance of the evidence a breach of warranty by respondent and the damages sustained by complainant as a result of the breach. In our opinion, the evidence is inadequate on both points. The L. & N. inspector failed to state the number of sacks of potatoes inspected in complainant's warehouse and admittedly he did not inspect any of the undisclosed portion of the shipment which was stored in complainant's cold storage room. Complainant submitted no satisfactory evidence as to what was wrong with the potatoes or when the potatoes were resorted. Obviously, respondent would not be liable for deterioration in the potatoes several weeks after delivery. The formal complaint should be dismissed.

#### ORDER

The complaint is dismissed.

Copies hereof shall be served upon the parties.

## COURT DECISIONS

ALEXANDER MARKETING COMPANY *v.* HARRISBURG DAILY MARKET,  
9 F. R. D. 248. Decided August 2, 1949.

UNITED STATES DISTRICT COURT, MIDDLE DISTRICT PENNSYLVANIA

Civil Action No. 3378

**Personal Service of Notice of Appeal Not Required—Nonresident Adverse  
Party—Service by Registered Mail**

Where respondent-appellant proved the mailing of a copy of the notice of appeal to the complainant, a nonresident, by registered mail, the court held that personal service by the United States Marshal upon complainant was not required under the Perishable Agricultural Commodities Act, 1930.\*

**Proceedings Under Perishable Agricultural Commodities Act, 1930 Excepted  
From Federal Rules of Civil Procedure—Commencement of Proceedings**

The Perishable Agricultural Commodities Act, 1930, as amended, (7 U. S. C. A. Section 499g (c)) excepts the proceedings under the act from the Federal Rules of Civil Procedure with respect to the manner of commencement of the proceedings required by Rule 81 (a) (4).\*

†[248] A reparation order was made by the Secretary of Agriculture after a hearing under the Perishable Agricultural Commodities Act on the complaint of the Alexander Marketing Company against the Harrisburg Daily Market. On motion by the Alexander Marketing Company to dismiss the appeal taken by the Harrisburg Daily Market from the reparation order.

Motion to dismiss denied.

†[249] William A. Bissell, of Stark, Bissell & Griffith, Scranton, Pa., Seward R. Moore, Neil A. Riley, Minneapolis, Minn., for plaintiff.

James W. Reynolds, of Shelley & Reynolds, Harrisburg, Pa., for respondent.

WATSON, *Chief Judge.*

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

†Italic figures in brackets refer to first word beginning a page in 9 F. R. D. 248.—Ed.

This is an appeal by Harrisburg Daily Market from a reparation order made by the Secretary of Agriculture, after hearing held at Harrisburg in this District under the Perishable Agricultural Commodities Act, 1930, Section 7 (c), as amended, 7 U. S. C. A. 499g (c). The matter is before the Court on a motion to dismiss the appeal by Alexander Marketing Company, complainant, before the Secretary of Agriculture and appellee in this proceeding.

Dismissal of the appeal is sought on the grounds that (1) the Alexander Marketing Company is not a resident of the State of Pennsylvania and was not, and is not, subject to service of process of the United States District Court for the Middle District of Pennsylvania; and (2), if said Alexander Marketing Company is subject to service of process of the United States District Court for the Middle District of Pennsylvania, such service was not made personally by a United States Marshal, as required by Rule 4 (c) of the Federal Rules of Civil Procedure, 28 U. S. C. A.

Section 7 (c) of the Perishable Agricultural Commodities Act, as amended, states in part: "Either party adversely affected by the entry of a reparation order by the Secretary may \* \* \* appeal therefrom to the district court of the United States for the district in which said hearing was held. \* \* \* Such appeal shall be perfected by the filing of a notice thereof together with a petition in duplicate which shall recite prior proceedings before the Secretary, and shall state the grounds upon which petitioner relies to defeat the right of the adverse party to recover the damages claimed, with the clerk of said court with proof of service thereof upon the adverse party, together with a bond in double the amount of the reparation award \* \* \*."

[1] Proceedings under this Act are excepted from the Federal Rules of Civil Procedure with respect to the manner of commencement of the proceedings by Rule 81 (a) (4) of the Federal Rules of Civil Procedure, 28 U. S. C. A. which provides in part: "These rules do not alter the method prescribed by the \* \* \* Act of June 10, 1930, c. 436, § 7, 46 Stat. 534, as amended Title 7 U. S. C. A. § 499g (c), for instituting proceedings in the district courts of the United States to review orders of the Secretary of Agriculture." See *Login Corp. v. Botner et al.*, D. C. N. D. Cal. 1947, 74 F. Supp. 133. Therefore, the language of the Perishable Agricultural Commodities Act must control the proper method for instituting these proceedings in this Court.

The only question here is, whether the respondent-appellant followed that portion of the Act which requires filing with the clerk

a proof of service of the notice of appeal and the appeal petition on the adverse party. There is no doubt that respondent-appellant complied with all other requirements of the Act for instituting such proceedings.

The respondent-appellant filed an alleged proof of service of the notice of appeal and the appeal petition by certifying that it mailed at the post office at Harrisburg, Pennsylvania a copy of an attached letter, notice of appeal and appeal petition to Alexander Marketing Company, San Benito, Texas, and Messrs. Seward R. Moore and Neil Riley, 415 Northwestern National Life Insurance Building, Minneapolis, Minnesota, attorneys for Alexander Marketing Company, and by attaching registered receipts for the same. After the filing of the motion to dismiss, the respondent-appellant also filed an alleged proof of service of appeal in the form of registered return receipts for the above mentioned letters.

[2] Congress intended to require proof that the adverse party received notice that an appeal had been instituted. It is clear that Congress did not intend to require personal service by a United States Marshal upon the adverse party in the case †[250] of an appeal from a reparation order of the Secretary of Agriculture. Such construction would make an appeal under the Act impossible in most cases. The Act permits an appeal only to the District Court of the United States for the district in which the Secretary of Agriculture held the hearing. Seldom if ever do both parties to the proceedings reside in the district in which the hearing was held. It could not have been the intent of Congress to extend the right to such appeal to some parties aggrieved by the award of the Secretary of Agriculture and not to others who find it impossible to cause personal service to be had as contended by the Alexander Marketing Company, complainant-appellee.

[3] The respondent-appellant in this case has perfected its appeal by complying with all the provisions of the Perishable Agricultural Commodities Act as to appeals, and this Court has jurisdiction of the matter.

The motion to dismiss will be denied.

Now, August 2, 1949, the motion by Alexander Marketing Company to dismiss the appeal in this case is denied.

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†Italic figures in brackets refer to first word beginning a page in 9 F. R. D. 248.—Ed.

**ALEXANDER MARKETING COMPANY v. HARRISBURG DAILY MARKET,\***  
87 F. Supp. 124. Decided November 19, 1949.

**UNITED STATES DISTRICT COURT, MIDDLE DISTRICT, PENNSYLVANIA**

**Civil Action No. 3378**

**De Novo Proceeding—Effect of Evidence Failing to Overcome Prima Facie Case**

Where the Secretary of Agriculture entered a reparation award with respect to a claim for refusal to accept the produce in favor of Alexander Marketing Company, complainant, against Harrisburg Daily Market, respondent, who appealed the case, the District Court sustained the Secretary's order for complainant and held that the evidence submitted by respondent did not overcome the prima facie case made out by complainant and, notwithstanding the proceeding in the District Court is not in the nature of an appeal from, or review of, the Secretary's determination, but is a proceeding de novo.\*\*

**Evidence—Effect of Failure to Overcome Prima Facie Case**

The evidence submitted by the respondent in this case, the District Court held, did not overcome the prima facie case made out by complainant before the Secretary of Agriculture to the effect that the tomatoes in question were federally inspected at shipping point, at which time they were certified to be U. S. No. 1 grade and in suitable shipping condition, as required by the terms of the contract between the parties.\*\*

**Damages—Resale of Commodity—Costs—Reasonable Attorney's Fee**

The District Court ordered judgment to be entered against respondent in favor of complainant for the amount of the difference between the sale price of the produce and the net sum realized on resale, for costs, and for reasonable attorney's fee.\*\*

*William A. Bissell* (of Stark, Bissell & Griffith), Scranton, Pa., *Seward R. Moore*, *Neil A. Riley*, Minneapolis, Minn., for plaintiff.

*James W. Reynolds* (of Shelley & Reynolds), Harrisburg, Pa., for respondent.

*WATSON, Chief Judge.*

† [124] This is an appeal by Harrisburg Daily Market from a reparation order of the Secretary of Agriculture wherein the Harrisburg Daily Market was ordered to pay to Alexander Marketing Company the sum of \$1,339.10 with interest at five per cent. (5%) from June 15, 1947. The appeal was taken under Section 499g of Title 7 U. S. C. A., and the case was tried de novo by this Court without a jury.

At the trial, the complainant (appellee) introduced into the record the findings of fact and the order issued by the Department of Agri-

\*8 A. D. 273, sustained.—Ed.

\*\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

†Italic figures in brackets refer to first word beginning a page in 87 F. Supp. 124.—Ed.

culture in this proceeding. These findings were that complainant is a corporation whose address is San Benito, Texas; that respondent is a partnership, whose address is Harrisburg, Pennsylvania, and who was licensed under the Perishable Agricultural Commodities Act, 7 U. S. C. A. § 499a et seq., during the time of the transaction herein involved; that, on June 6, 1947, respondent purchased from complainant one carload of Texas U. S. No. 1 tomatoes in Car NWX8393 at \$4 per lug f. o. b. shipping point or \$3,120.00 for the 780 lugs in the carload; that Shanpanier Brokerage Company, of Scranton, negotiated the contract between the parties; that the tomatoes were federally inspected at shipping point and were certified to be mature green and U. S. No. 1 grade with no decay; that the tomatoes were shipped from Athens, Texas, on June 6, 1947; that the shipment arrived at Harrisburg at 9:30 A. M. on June 11, 1947; that respondent requested federal inspection at 11:00 A. M. on June 11, 1947; that inspection was made at 7:40 P. M. on June 12, 1947; that this inspection certificate notes under "Condition" an average of 6 per cent. (6%) decay, ranging from 3 to 12 per cent. in most samples, none in some, the decay being mostly bacterial soft rot †[125] in various stages; that this inspection certificate notes than an average of 8 per cent. (8%) of the tomatoes contained numerous discolored sunken areas; that the quality factors were within the 10 per cent. (10%) tolerance allowed in the U. S. No. 1 grade, and that the bunkers were empty of ice and the temperatures of the product in the doorways were 80 degrees at the top and 78 degrees at the bottom; that respondent rejected the shipment within one hour after receipt of this inspector's report; that complainant resold the tomatoes in this car at Philadelphia on or about June 16, 1947 at prices ranging from \$2.75 to \$3.25 per lug, with gross proceeds of \$2,482.56, and net proceeds, after deductions for freight, selling charges and other expenses, of \$1,780.90; that no payment has been made by respondent to complainant on account of this transaction; and that the formal complaint was filed within nine months after the cause of action accrues. The complainant also introduced into the record the original certificate of the inspection of this carload of tomatoes made at the point of shipment. This certificate states that these tomatoes were U. S. No. 1 grade on June 6, 1947 at Athens, Texas.

[1] This *prima facie* case made out by the findings of the Secretary of Agriculture must prevail in this Court unless overcome by evidence submitted by respondent, notwithstanding the proceeding in this Court is not in the nature of an appeal from, or review of, that determination, but is a proceeding *de novo*.<sup>1</sup>

<sup>1</sup> *Barker-Müller Distributing Co. v. Berman*, D. C. W. D. N. Y. 1934, 8 F. Supp. 60.

†Italic figures in brackets refer to first word beginning a page in 87 F. Supp. 124.—Ed.



The respondent contends that, since the tomatoes were not U. S. No. 1 grade on arrival at Harrisburg, they could not have been in suitable shipping condition when they were placed on board the car in Athens, Texas. The respondent introduced into the record a copy of the inspection certificate from an inspection of the tomatoes made at Harrisburg on June 12, 1947, which certifies that the tomatoes failed to grade U. S. No. 1 at that time. The inspection at Harrisburg was restricted to the upper two layers of tomatoes in the carload. The respondent called as a witness Eugene R. Pheil, a fresh fruit and vegetable inspector for the United States Department of Agriculture, who made the inspection of these tomatoes at Harrisburg. Pheil testified that these tomatoes failed to grade U. S. No. 1 at that time because of excessive discolored sunken areas and excessive decay. Pheil stated that, in his opinion, the injuries from which the sunken areas arose would not likely have occurred during the course of shipment, and that the increase in sunken areas and decay between the time of arrival of the tomatoes in Harrisburg and his inspection would be very slight. On cross-examination Pheil testified that he had no reason to doubt the correctness of the inspection certificate made from an inspection of these tomatoes at shipping point. Another witness called by the respondent, who was familiar with the normal running time of freight trains in various parts of the country, testified that the time this carload of tomatoes was in transit from Athens, Texas, to Harrisburg was "a better than normal run" and "a good run that couldn't be beat."

According to the provisions of the Perishable Agricultural Commodities Act, the Secretary of Agriculture may make such rules and regulations as may be necessary to carry out the provisions of the Act.<sup>2</sup> In defining trade terms these regulations provide that "f. o. b. shipping point" means that the produce quoted or sold is to be placed free on board the transportation agency at shipping point in suitable shipping condition, and that the buyer assumes all risk of damage and delay in transit not caused by the shipper.<sup>3</sup> The regulations further provide that "suitable shipping condition" means that the commodity, at the time of billing, is in a condition which, if the shipment is handled under normal transportation service and conditions, will assure delivery without †[126] abnormal deterioration at the destination specified in the contract of sale.<sup>4</sup>

<sup>2</sup> 7 U. S. C. A. § 499o.

<sup>3</sup> 7 C. F. R. 46.24 (1).

<sup>4</sup> 7 C. F. R. 46.24 (1).

†Italic figures in brackets refer to first word beginning a page in 87 F. Supp. 124.—Ed.

[2] The evidence submitted by the respondent in this case did not overcome the prima facie case made out by the complainant to the effect that these tomatoes were federally inspected at shipping point, at which time they were certified to be U. S. No. 1 grade and in suitable shipping condition, as required by the terms of the contract between the parties.

Judgment will be entered against the respondent and in favor of the complainant for the amount of the difference between the sale price of the tomatoes and the net sum realized on their resale, for costs, and for a reasonable attorney's fee.

Findings of fact, conclusions of law, and direction for the entry of judgment and taxing of costs are filed herewith.

#### FINDINGS OF FACT

1. Complainant, Alexander Marketing Company is a corporation whose address is San Benito, Texas. Respondent, Harrisburg Daily Market, is a partnership whose address is Harrisburg, Pennsylvania, and who was licensed under the Perishable Agricultural Commodities Act during the period covered by the Complaint.

2. On or about June 6, 1947, respondent purchased from complainant one carload of Texas U. S. No. 1 tomatoes in car NWX 8393 at \$4 per lug f. o. b. shipping point, or \$3,120.00 for the 780 lugs in the carload.

3. The tomatoes were federally inspected at shipping point, at which time they were mature green, U. S. No. 1 grade, with no decay, and were in a condition which assured delivery without abnormal deterioration at the destination specified in the contract, if handled under normal transportation service and conditions.

4. The tomatoes were shipped from Athens, Texas, on June 6, 1947, and arrived at Harrisburg at 9:30 A. M. on June 11, 1947. This was a better than normal time for shipment between these two points.

5. The tomatoes were federally inspected in Harrisburg at 7:40 P. M. on June 12, 1947, and were certified not to be U. S. No. 1 grade because of excessive discolored sunken areas and excessive decay.

6. Respondent rejected the tomatoes one hour after receipt of the inspector's report.

7. Complainant resold the tomatoes at Philadelphia on or about June 16, 1947 for a gross price of \$2,482.56. After payment of freight, selling charges and other expenses in the amount of \$701.66, complainant realized net proceeds of \$1,780.90.

8. Complainant brought action under the Perishable Agricultural Commodities Act, and was awarded in that action a reparation order

in the sum of \$1,339.10, with interest at five per cent. (5%) from June 15, 1947 until paid.

9. Within thirty days after the final order of the Secretary of Agriculture, an appeal from the order was filed in this Court.

### CONCLUSIONS OF LAW

1. This case is properly before this Court and this Court has jurisdiction under the Perishable Agricultural Commodities Act, 7 U. S. C. A. § 499g.

2. The contract between complainant and respondent, by the use of the term "f. o. b. shipping point", required this carload of tomatoes to be in suitable shipping condition when placed on board the car in Athens, Texas.

3. This carload of tomatoes was "in suitable shipping condition" when placed on board the car in Athens, Texas.

4. Respondent was bound by the terms of the contract to accept the tomatoes shipped.

5. Complainant is entitled to the amount of the difference between the sale price of the tomatoes and the net sum realized on their resale.

6. Complainant is entitled to a reasonable attorney's fee.

†[127] Now, November 18, 1949, the Clerk of this Court is directed to enter judgment in favor of Alexander Marketing Company and against Harrisburg Daily Market in the sum of \$1,339.10, with interest at five per cent. (5%) from June 15, 1947 to this date, and the Clerk is further directed to tax costs and an attorney's fee of \$250.00 against the Harrisburg Daily Market, the attorney's fee to be paid to Stark, Bissell and Griffith, and Moore and Riley, counsel of record for the Complainant, Alexander Marketing Company.

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†Italic figures in brackets refer to first word beginning a page in 87 F. Supp. 124.—Ed.

# INDEX-DIGEST AND SUBJECT-INDEX OF AGRICULTURE DECISIONS

APRIL 1950

## AGRICULTURAL MARKETING AGREEMENT ACT OF 1937 ORDER NO. 27 (NEW YORK)

### RECLASSIFICATION OF MILK

	No.	Page
Where market administrator under Order No. 27 reclassified to Class I-A certain quantities of milk originally reported by petitioner in Class IV-B as Cheddar cheese and it appeared that a fire destroyed or damaged the plant and the cheese manufactured therein was damaged and disposed of in other than usual commercial channels and the handler was apparently unaware until after reclassification of the milk involved from Class IV-B to Class I-A that failure to record the disposition of the damaged cheese would result in the reclassification of the milk into Class I-A, it is held, in view of all the circumstances involved, that the reclassification was "not in accordance with law" and, therefore, petitioner's request for relief should be granted..	2408	433
Market administrator's reclassification of milk from Class IV-B to Class I-A, held, in view of all the circumstances involved, was "not in accordance with law"-. .	2408	439

### PACKERS AND STOCKYARDS ACT, 1921

## CEASE AND DESIST

### VIOLATION OF ACT

Respondents are ordered to cease and desist from practices complained of and directed specifically to keep certain records.....	2413	466
Respondents ordered to cease and desist from indicating on billings or copies of scale tickets, in selling as a dealer that any person other than themselves is the owner of livestock sold and directed to keep accounts, records and memoranda as will fully disclose all transactions involved in their business.....	2414	468
Where the order of inquiry charged respondent with wilful violations of various provisions of the act and the respondent admitted such allegations but denied wilfulness in connection therewith and consented to a cease and desist order, which was recommended by the Livestock Branch, the respondent is ordered to cease and		

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**PACKERS AND STOCKYARDS ACT, 1921—Continued****CEASE AND DESIST—Continued****VIOLATION OF ACT—Continued**

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desist from failing to report on accounts of sale the correct names of purchasers of consigned livestock sold by respondent on a commission basis; failing to render reasonable and just selling services; engaging in unfair and deceptive practices; selling livestock bought by employees as dealers in competition with livestock consigned to respondent for sale for accounts of shippers on commission; failing to keep full and correct accounts and records of transactions in his business; making or causing to be made false entries in his accounts, books and records; and selling consigned livestock to an employee.....	2409	440
Where the order of inquiry charged respondent with wilful violations of various provisions of the act and the respondents, in their answer, admitted certain allegations of fact alleged in the order of inquiry and explained others and consented to a cease and desist order, which was recommended by the Livestock Branch, the respondents are ordered to cease and desist from failing to render reasonable buying and selling services; engaging in unfair and deceptive practices; assessing and charging rates or charges other than those set out in respondents' tariffs on file with the Secretary; failing to keep full and correct accounts and records of all transactions in respondents' business; causing false copies of accounts of purchase and accounts of sale to be made a part of respondents' accounts and records; purchasing livestock out of consignments for sale on a commission basis except as permitted by the regulations; permitting their employees to deal in consigned livestock, and selling livestock acquired by the respondents' employees on a dealer basis in competition with livestock consigned to respondents for sale for the accounts of shippers on commission.....	2411	450
Where the order of inquiry charged respondent with wilful violations of various provisions of the act and the respondent, in his answer, admitted such allegations and consented to a cease and desist order, which was recommended by the Livestock Branch, the respondent is ordered to cease and desist from failing to show the true names of purchasers on accounts of sale rendered to consignors for whom respondent has sold livestock on a commission basis; failing to show on accounts of sale rendered to consignors that consignors' livestock have been used to fill orders handled by respondent on a commission basis; permitting his		

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**PACKERS AND STOCKYARDS ACT, 1921—Continued****CEASE AND DESIST—Continued****VIOLATION OF ACT—Continued**

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employees or agents to deal in consigned livestock; failing to keep such accounts, records and memoranda as would fully disclose all transactions in respondent's business; failing to render just and reasonable buying and selling services; failing to report on accounts of purchase rendered to his principals that livestock have been purchased out of consignments received by respondent for sale on a commission basis; and selling livestock purchased by respondent's employees on a speculative basis in competition with livestock consigned to respondent for sale on a commission basis..	2410	444
Where the order of inquiry charged respondent with wilful violations of various provisions of the act and the respondent, in his answer, admitted such violations but denied wilfulness in connection therewith and consented to a cease and desist order, which was recommended by the Livestock Branch, the respondent is ordered to cease and desist from failing to report on accounts of sale the correct names of purchasers of consigned livestock sold by the respondent on a commission basis; failing to report on accounts of purchase the correct names of the sellers of livestock purchased by the respondent on a commission basis; failing to report to consignors and to purchasers that consignors' livestock was used by respondent to fill orders handled for the purchasers by the respondent on a commission basis; failing to render reasonable and just selling services; engaging in unfair and deceptive practices; selling, in competition with livestock consigned to respondent for sale on a commission basis, livestock bought by his employees or by respondent on a dealer basis; making or causing to be made false entries in respondent's accounts, records and memoranda; selling consigned livestock to his employees or to partnerships in which his employees are partners; taking consigned livestock into the account of respondent market agency, except in compliance with the regulations; and operating as a dealer without being registered and bonded as required by the act and the regulations.....	2412	457

**REGISTRATION****SUSPENSION OF**

Respondents' registration suspended for violations of sections 305, 312 (a) and 402 of the act but suspension not to be effective unless respondents are found to have violated the act again within two years.....	2413	466
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**PACKERS AND STOCKYARDS ACT, 1921—Continued**

<b>VIOLATION OF ACT</b>	<b>No.</b>	<b>Page</b>
Assessing and charging any rate or charge for purchase or sale of livestock on commission basis other than rates and charges set out in respondents' tariffs on file with Secretary of Agriculture pursuant to act.....	2411	455
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Charging consignors unreasonable or unjust rates for fee...	2413	467
Engaging in unfair and deceptive practices..... 2409: 443; 2412: 463.	2411	455
Indicating on billings, or copies of scale tickets, in selling livestock as a dealer that any person other than respondents is the owner of the livestock sold.....	2414	471
Failing to keep full and correct accounts and records of transactions in respondent's business... ..	2409	443
Failing to keep such accounts, records and memoranda as fully disclose all transactions in respondent's business..... 2410: 448.	2411	455
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Failing to render reasonable and just selling services..... 2412: 463.	2409	443
Failing to report on accounts of purchase correct names of sellers of livestock purchased by respondent on commission basis.....	2412	463
Failing to report on accounts of purchase rendered to respondent's principals that livestock have been purchased out of consignments received by respondent for sale on commission basis.....	2410	448
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Failing to show on accounts of sale rendered to consignors that consignors' livestock have been used to fill orders handled by respondent on commission basis.....	2410	448

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**PACKERS AND STOCKYARDS ACT, 1921—Continued**

<b>VIOLATION OF ACT—Continued</b>	<b>No.</b>	<b>Page</b>
Failing to show true names of purchasers on accounts of sale rendered to consignors for whom respondent has sold livestock on commission basis.....	2410	448
Making or causing to be made false entries in accounts, books and records..... 2409: 443;	2412	463
Operating as dealer without being registered and bonded as required by act and regulations.....	2412	463
Permitting employees or agents to deal in consigned livestock..... 2410: 448;	2411	455
Purchasing livestock, out of consignments for sale on commission basis, except as permitted by regulations.....	2411	455
Selling consigned livestock to employee.....	2409	443
Selling consigned livestock to employees or to partnerships in which respondent's employees are partners.....	2412	463
Selling in competition with livestock consigned to respondent for sale on commission basis livestock bought by respondent's employees as dealers or purchased by respondent on dealer basis.....	2412	463
Selling livestock, acquired by respondents' employees on dealer basis, in competition with livestock consigned to respondents for sale for the accounts of shippers on commission basis.....	2411	455
Selling livestock bought by employees as dealers in competition with livestock consigned to respondent for sale for accounts of shippers on commission.....	2409	443
Selling livestock purchased by respondent's employees on speculative basis in competition with livestock consigned to respondent for sale on commission basis.....	2410	448
Taking consigned livestock into account of respondent market agency, except in compliance with regulations pertaining thereto.....	2412	463

**PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930****ACCORD AND SATISFACTION****FACTS FAILING TO SHOW**

In a contract of sale, where the broker without the seller's authority agrees to grant the buyer an allowance for claims against the seller, but the buyer does not pay the reduced price and the seller repudiates the allowance agreement when informed thereof, held, that there was no accord and satisfaction and the allowance is not binding upon the seller.....	2417	475
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**PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Continued**

<b>ACCORD AND SATISFACTION—Continued</b>	<b>No.</b>	<b>Page</b>
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<b>MEASURE OF, BASED ON—</b>		
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The proper measure of damages for failure to deliver tomatoes meeting contract requirements is the difference in value between tomatoes of the kind that should have been delivered and those that were delivered as of the time and place of delivery.....	2430	518
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2418: 488; 2421: 496; 2422: 498; 2423: 500; 2425: 506; 2428: 515.		
<b>PETITION TO REOPEN AFTER</b>		
A default will be reopened and respondent permitted to file an answer only for "good reason." Even though respondent's failure to answer may have been the result of excusable neglect, "good reason" is not shown where respondent does not have additional or different facts to present and it appears on the face of the submissions a hearing would not result in conclusions different from those already reached.....	2427	512
<b>Waiver of oral hearing by.....</b>	2415	473
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<b>DISMISSAL</b>		
<b>FAILURE TO FULFILL CONDITION PRECEDENT</b>		
Where complainant alleged that he purchased five car-loads of onions from respondent, who failed to deliver the onions in accordance with the contract, but re-		

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**PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Continued****DISMISSAL—Continued****FAILURE TO FULFILL CONDITION PRECEDENT—Continued**

respondent contended that the sale was conditional upon respondent's ability to procure the onions from the Colorado owner, and that respondent was unsuccessful in its efforts to obtain the onions, it is held, in a suit by complainant for damages resulting from respondent's alleged breach of contract, that the facts and circumstances and the logical conclusions to be drawn therefrom, support a finding that the contract of purchase and sale of the onions was conditional upon respondent's ability to procure the onions, and the complaint should be dismissed.....

No. Page

2419 489

Petition for reconsideration..... 2429 517

**FAILURE TO PROVE BREACH OF WARRANTY**

Where complainant contends potatoes purchased from respondent on delivered basis were not up to the grades warranted and that respondent agreed to protect complainant against any loss sustained on resorting the potatoes, held, that complainant failed to show the potatoes were not of the grades warranted at the time of delivery and, therefore, the complaint should be dismissed.....

2432 526

**SETTLEMENT BETWEEN PARTIES**

Where complainant's attorney notified the Department that the controversy has been settled and requested dismissal of the complaint, the complaint is, accordingly, dismissed.....

2420 494

Where the Department was notified that the parties have reached an amicable settlement of the controversy, and dismissal of the proceeding was requested, the complaint is dismissed.....

2416 474

**EVIDENCE**

Breach of contract..... 2430 521

Burden of proof of affirmative defense..... 2431 525

Damages based on amount offered in settlement..... 2430 521

**DISPUTED DATE OF TRANSACTION**

In a conditional sale of certain onions, where the date of the transaction is disputed by the parties, the purchaser claiming that it took place on November 6, 1947, while the seller states that it was October 6, it is held, that since the agreed terms and the price of the onions are consistent only with the October 6 market quotations, the contract between the parties was entered into on October 6, 1947, as contended by respondent.....

2419 489

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**PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Continued**

<b>EVIDENCE—Continued</b>	<b>No.</b>	<b>Page</b>
<b>FACTS FAILING TO SHOW—</b>		
accord and satisfaction.....	2417	481
Failure to prove breach of warranty on delivered sale.....	2432	528
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Effect of purchase made subsequent to.....	2426: 509; 2424	503
<b>PRINCIPAL AND AGENT</b>		
Buyer bound by inspection of its agents.....	2424	503
<b>RATIFICATION OF ACCORD AND SATISFACTION</b>		
In a contract of sale, where the broker without the seller's authority agrees to give the buyer an allowance for claims against the seller and accepts the buyer's check for less than the purchase price in full settlement and the seller receives and retains the check with full knowledge of the facts, held, that the accord and satisfaction, though unauthorized, was ratified by the seller.....	2417	475
<b>RECONSIDERATION</b>		
<b>DENIAL OF PETITION FOR</b>		
Where an order was issued dismissing the complaint for failure to prove damages sustained as a result of a breach of contract, and complainant filed a petition for reconsideration of the order, setting forth matters alleged to have been erroneously decided, it is held, after a review of the record, that the original order is supported by the evidence and the law applicable thereto, and the petition is, therefore, dismissed.....	2429	516
<b>REHEARING AND RECONSIDERATION</b>		
<b>DENIAL OF PETITION FOR</b>		
A petition for rehearing and reconsideration is denied where no answer has been filed, and there is no allegation of irregularity in the prior order.....	2427	512
<b>REJECTION OF COMMODITY</b>		
Without reasonable cause.....	2417	481
<b>REPARATION</b>		
<b>AMOUNT OFFERED IN SETTLEMENT</b>		
Where, pursuant to the contract of the parties, respondent delivered to complainant a carload of tomatoes which were not in suitable shipping condition, and complainant resold the tomatoes over a 2-week period of time, held, that the evidence showing complainant was damaged by respondent's breach of contract is insufficient to prove the exact damages sustained, but since the evidence shows complainant		

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**PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Continued****REPARATION—Continued**

No. Page

**AMOUNT OFFERED IN SETTLEMENT—Continued**

suffered damages in the amount earlier offered by respondent in full settlement of the claim, complainant should be awarded reparation for that amount..... 2430 518

**FAILURE TO PAY BALANCE OF PURCHASE PRICE**

Where complainant alleged that he sold four truckloads of apples to respondent but that respondent failed to pay the full purchase price and where respondent failed to file an answer to the formal complaint, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, and respondent's failure to pay the full purchase price is in violation of section 2 of the act for which complainant is entitled to an award of reparation in the amount of the unpaid balance of the purchase price..... 2415 472

Where complainant-seller, in an action for the unpaid balance of the purchase price of a truckload of beans, alleged that respondent-buyer purchased the beans after a personal inspection by respondent's buying agents at complainant's packing house, and respondent alleged that the beans were purchased upon the basis of an express warranty by complainant of sound arrival, but respondent's buying agents admitted inspecting the beans at complainant's packing house and seeing rotten ends on a great many of the beans being loaded, it is concluded, that it is unlikely that complainant as a reasonable businessman would guarantee sound arrival of a truckload of beans in that condition to be shipped from Florida to New York, and, in view of all the circumstances surrounding the transaction, it is held, that this was a purchase and sale after inspection by respondent's agents with no express warranty of sound arrival by complainant, that respondent was bound by the inspection of its agents, and that failure to pay complainant the full purchase price for the beans was a violation of the act entitling complainant to an award of reparation for the balance of the purchase price..... 2424 500

**FAILURE TO PAY PURCHASE PRICE**

Respondent's failure to pay the purchase price for a carload of mixed vegetables delivered to and accepted by respondent, and his failure to file an answer, constituting an admission of the facts alleged in the complaint and a waiver of oral hearing, entitles complainant to an award of reparation in the amount of the purchase price, with interest..... 2418 487

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**PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Continued**  
**REPARATION—Continued**

**FAILURE TO PAY PURCHASE PRICE—Continued** **No.      Page**

Where complainant alleged that it sold onions to respondent who failed to pay the agreed purchase price and where respondent failed to file an answer, held, that his failure to file an answer constitutes an admission of the facts alleged in the complaint, and his failure to pay the purchase price is a violation of the act for which reparation should be awarded complainant in the amount of the purchase price..... 2421      494

Where complainant alleged that it sold tomatoes to the respondent and respondent did not pay the full purchase price and where respondent did not file an answer, held, that respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint, respondent's failure to pay the full purchase price is a violation of section 2 of the act, and complaint should be awarded reparation in the amount of the unpaid balance due, with interest..... 2422      496

Where complaint alleged that respondent failed to pay the full purchase price for a truckload of potatoes and where respondent failed to file an answer to the complaint, held, that failure of respondent to file an answer constitutes an admission of the facts alleged in the complaint, and its failure to pay the full purchase price is in violation of section 2 of the act for which complainant is entitled to an award of reparation in the amount of the purchase price, with interest.. 2423      498

Where complaint alleged that respondent purchased a carload of apples but failed to pay the agreed purchase price, and where respondent failed to file an answer, held, respondent's failure to answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, and his failure to pay the purchase price is in violation of the act for which reparation should be awarded complainant in the amount of the purchase price, with interest..... 2425      505

Where complainant contracted to sell to respondent 6,000 bushels of apples to be taken out of storage by respondent at the rate of 1,200 bushels a week, and respondent failed to pay for two truckloads received and rejected other shipments, claiming that they were not in suitable shipping condition, held, that respondent breached the contract by failing to order the apples out of storage at the time agreed upon and

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**PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Continued****REPARATION—Continued****FAILURE TO PAY PURCHASE PRICE—Continued**

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that complainant had packed and on hand in storage more apples of the grade specified than respondent would take, and, therefore, complainant should be awarded reparation for the purchase price of the two truckloads and the difference between the contract price of the truckloads rejected and the amount received on resale.....	2417	475
Where complainant sold Mexican tomatoes to respondent who accepted delivery after its buyers had an opportunity for unrestricted inspection and without relying upon any warranty but thereafter refused to pay the purchase price because of an alleged loss from Macrosporium rot, complainant should be awarded reparation in the sum of the full contract purchase price....	2426	507
Where respondent alleged, as a defense to a complaint against it to recover the unpaid balance of the purchase price of a shipment of apples, that complainant contracted to sell to respondent apples of Extra Fancy and Fancy grade and that a new contract was entered whereby complainant authorized respondent to sell the apples for complainant's account, it is held, that the burden is on respondent to show the grade alleged was part of the contract of purchase and sale and that a new contract was entered and that since respondent has failed to support its defense, complainant is entitled to an award of reparation in the amount of the purchase price.....	2431	523
Where respondent failed to pay complainant for a truckload of tomatoes and also failed to file an answer to the formal complaint, held, that respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint and failure to make payment is a violation of section 2 of the act for which complainant is entitled to an award of reparation in the amount of the purchase price.....	2428	514

**SUITABLE SHIPPING CONDITION****EVIDENCE SHOWING LACK OF**

Where the percentage of decay in a carload of tomatoes was excessive at destination, and transportation service and conditions were normal, it is concluded the tomatoes were not in suitable shipping condition irrespective of whether the decay was caused by disease of field origin.....	2430	518
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**PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Continued**

<b>VIOLATION OF ACT</b>	<b>No.</b>	<b>Page</b>
<b>FAILURE TO PAY—</b>		
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Unlawful rejection.....	2417	481
<b>WARRANTIES</b>		
<b>IMPLIED WARRANTY EXISTS, WHEN</b>		
An implied warranty concerning quality or condition exists when circumstances of the sale disclose evidence that the buyer had reason to and did in fact rely upon the skill or judgment of the seller.....	2426	507
<b>PURCHASE AFTER INSPECTION AS PRECLUDING, OF VALUE</b>		
Where a truckload of beans was purchased after inspection by the buyer's agents, who claimed that the seller guaranteed sound arrival of the beans, but respondent's agents admitted inspecting the beans and observing rotten ends on a great many of the beans being loaded, it is held in effect that, where a dealer buys a perishable commodity in which he habitually dealt, fully understanding that what he was buying was not in first-class condition and had, in some degree, the very defect of which he later complained, there was no warranty of value or quality under such circumstances.....	2424	501

# INDEX-DIGEST AND SUBJECT-INDEX OF COURT DECISIONS

APRIL 1950

## PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930

### APPEAL

#### PERSONAL SERVICE OF NOTICE OF, NOT REQUIRED

Page

Where respondent-appellant proved the mailing of a copy of the notice of appeal to the complainant, a nonresident, by registered mail, the court held that personal service by the United States Marshal upon complainant was not required under the Perishable Agricultural Commodities Act, 1930, 9 F. R. D. 248. 531

### APPEAL FROM SECRETARY'S ORDER

Nature of proceeding in District Court involving Secretary's order is not an appeal or review, but a proceeding de novo, 87 F. Supp. 124. 535

### ATTORNEY'S FEE

Reasonable amount allowed attorney for complainant defending respondent's appeal from Secretary's reparation order, 87 F. Supp. 124. 537

### COSTS

Allowance of, to complainant defending respondent's appeal from Secretary's reparation order, 87 F. Supp. 124. 537

### DAMAGES

#### MEASURE OF, BASED ON RESALE OF COMMODITY

The District Court ordered judgment to be entered against respondent in favor of complainant for the amount of the difference between the sale price of the produce and the net sum realized on resale, for costs, and for reasonable attorney's fee, 87 F. Supp. 124. 534

### DE NOVO PROCEEDING

#### EFFECT OF EVIDENCE FAILING TO OVERCOME PRIMA FACIE CASE ON

Where the Secretary of Agriculture entered a reparation award with respect to a claim for refusal to accept the produce in favor of Alexander Marketing Company, complainant, against Harrisburg Daily Market, respondent, who appealed the case, the District Court sustained the Secretary's order for complainant and held that the evidence submitted by respondent did not overcome the prima facie case made out by complainant and, notwithstanding the proceeding in the District Court is not in the nature of an appeal from, or review of, the Secretary's determination, but is a proceeding de novo, 87 F. Supp. 124. 534



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**PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Continued**  
**EVIDENCE****EFFECT OF FAILURE TO OVERCOME PRIMA FACIE CASE**

The evidence submitted by the respondent in this case, the District Court held, did not overcome the prima facie case made out by complainant before the Secretary of Agriculture to the effect that the tomatoes in question were federally inspected at shipping point, at which time they were certified to be U. S. No. 1 grade and in suitable shipping condition, as required by the terms of the contract between the parties, 87 F. Supp. 124.....

534

**NOTICE OF APPEAL**

Registered mail proper medium for, 9 F. R. D. 248.....

533

**PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930****PROCEEDINGS UNDER, EXCEPTED FROM FEDERAL RULES OF CIVIL PROCEDURE**

The Perishable Agricultural Commodities Act, 1930, as amended, (7 U. S. C. A., Section 499g (c)), excepts the proceedings under the act from the Federal Rules of Civil Procedure with respect to the manner of commencement of the proceedings required by Rule 81 (a) (4), 9 F. R. D. 248.....

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**SERVICE OF NOTICE OF APPEAL**

Registered mail proper medium for, 9 F. R. D. 248.....

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# APPENDIX A

## Reference to Cumulative Material of Agriculture Decisions (1942-1950)

The following cumulative material will be found in the December issue (No. 12) of Agriculture Decisions, Volumes 1 (1942), 2 (1943), 3 (1944), 4 (1945), 5 (1946), 6 (1947), 7 (1948), and 8 (1949), respectively:

### Citations in Agriculture Decisions:

	Volume No. and Page
Statutes, orders, etc-----	1: 811; 2: 796; 3: 1179; 4: 1011; 5: 937; 6: 1194; 7: 1243; 8: 1425
Agriculture decisions-----	1: 815; 2: 801; 3: 1185; 4: 1015; 5: 940; 6: 1199; 7: 1250; 8: 1434
Court decisions-----	1: 817; 2: 804; 3: 1191; 4: 1021; 5: 945; 6: 1207; 7: 1255; 8: 1439
Decisions overruled by Secretary of Agriculture-----	1: 819*
Citations in Court Decisions:	
Statutes, orders, etc-----	2: 799; 3: 1182; 5: 938; 6: 1197; 7: 1248; 8: 1431
Appeals from Secretary's decisions (actions for review by courts)-----	1: 820; 2: 806; 3: 1193; 4: 1024; 5: 948; 6: 1213; 7: 1259; 8: 1445
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Agriculture Decisions cited by courts and other authorities--	1: 821; 2: 809; 3: 1195; 4: 1027; 5: 950; 6: 1218; 7: 1262; 8: 1448
Commodities involved in PACA proceedings-----	1: 822; 2: 810; 3: 1196; 4: 1028; 5: 951; 6: 1219; 7: 1264; 8: 1449
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Docket numbers and decisions arranged in consecutive order-----	1: 825; 2: 813; 3: 1203; 4: 1034; 5: 956; 6: 1225; 7: 1270; 8: 1455

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\*HISTORICAL NOTE.—The Secretary's decision in *In re Thatford Live Poultry, Inc.*, 1 A. D. 485, decided June 3, 1942, overruled prior decisions (Table of Decisions Overruled, 1 A. D. 819) as precedents because of lack of regulation requiring current assets to exceed current liability by at least 25 percent of average weekly purchases. Since that decision, regulation (9 CFR Cum. Supp. 201.14) setting up a standard of financial qualifications has been promulgated. *In re Albert Bree*, 3 A. D. 255 (1944).—Ed.

## Cumulative lists of decisions:

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## Agriculture Decisions:

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## reported-----

1: 820; 2: 815; 3: 1206; 4: 1037; 5: 959; 6: 1229;  
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## 1942 PACA decisions

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## ported-----

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## 1943 PACA decisions

## hitherto unre-

## ported-----

5: 965

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2: 803; 3: 1190; 4: 1020 (distinguished)

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## lowed in-----

3: 1190; 4: 1020

## Court Decisions:

## Court decisions pub-

## lished -----

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x-xix

## Court and Agricul-

## ture decisions dis-

## tinguished in-----

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## Court and Agricul-

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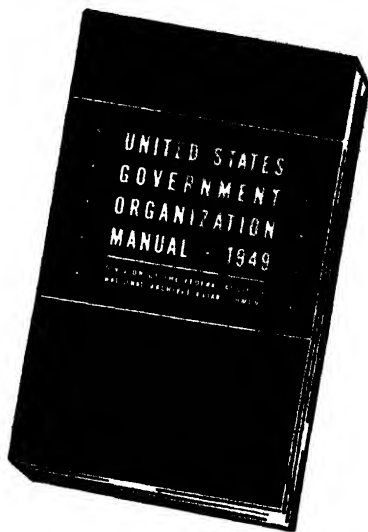




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**UNITED STATES DEPARTMENT OF AGRICULTURE**

# **AGRICULTURE DECISIONS**

**DECISIONS OF THE SECRETARY OF AGRICULTURE**

**UNDER THE  
REGULATORY LAWS ADMINISTERED IN THE  
UNITED STATES DEPARTMENT OF AGRICULTURE  
(Including Court Decisions)**



**VOL. 9, No. 5  
(Nos. 2433-2467)  
PAGES 567-692**

**MAY 1950**

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**Reported, indexed, and edited**  
**under the direction of**  
**W. CARROLL HUNTER, Solicitor**  
**By**  
**I. J. LOWE**  
**Attorney and Editor, Office of the Solicitor**

## PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered in the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial (as contrasted with quasi-legislative) character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for hearing have been given. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register. For reasons of policy, the identities of the parties are not reported in decisions issued under one statute which expressly authorizes, but does not require the publication of the facts and circumstances of a violation, unless the Secretary in his decision has specifically ordered or directed such publication.

The principal statutes concerned are the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 1946 ed. 601 *et seq.*), the Commodity Exchange Act (7 U. S. C. 1946 ed. 1 *et seq.*), the Grain Standards Act (7 U. S. C. 1946 ed. 71 *et seq.*), the Packers and Stockyards Act, 1921 (7 U. S. C. 1946 ed. 181 *et seq.*), and the Perishable Agricultural Commodities Act, 1930 (7 U. S. C. 1946 ed. 499a *et seq.*).

The decisions published are numbered serially, in the order in which they appear herein, as "Agriculture Decisions". They may be cited by giving the volume and page, for illustration, thus: 1 A. D. 472. It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D-578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in the Agriculture Decisions.

Current court decisions involving the regulatory laws administered by the Department will be published herein.

An Index-Digest and Subject-Index of the decisions reported and the court cases published herein will be found at end of each monthly issue, and the cumulative yearly Index-Digest and Subject-Index, lists of decisions reported, statutes, orders, etc., construed, and statistical and other tables will be found at the end of No. 12 (December) issue of the Agriculture Decisions.

Copies of monthly issues beginning with January 1942 of the decisions will be available through the Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C.

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**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**  
**AGRICULTURE DECISIONS**

(No. 2433)

*In re* L. W. DUNSON. AMA Doc. No. 33-1. Decided May 8, 1950.

**Dismissal—Failure to Appear**

Since petitioner failed to appear, pursuant to the rules of practice under the act, his petition is dismissed with prejudice.

*Messrs. C. Dean Reasoner and Karl J. Hardy*, Washington, D. C., for petitioner.  
*Mr. Frank E. Callinan* for Production and Marketing Administration. *Mr. Earl J. Smith*, Hearing Examiner.

*Decision by Thomas J. Flavin, Judicial Officer*

**ORDER OF DISMISSAL**

This is a proceeding arising under Section 8c (15) (A) of the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 601 *et seq.*). The petition relates to Order No. 33, as amended, regulating the handling of oranges, grapefruit, and tangerines grown in the State of Florida (7 CFR 933.1 *et seq.*).

A hearing on the petition was set by Glen J. Gifford, Office of Hearing Examiners, for March 27, 1950, in Washington, D. C. Petitioner was duly notified of the time and place of hearing by registered mail but neither the petitioner nor a representative appeared at the hearing.

Pursuant to section 900.60 (b) (3) of the rules of practice (7 CFR 900.60 (b) (3)), the petition is dismissed with prejudice because of the petitioner's failure to appear.

(No. 2434)

*In re* THE BABCOCK DAIRY COMPANY ET AL. AMA Doc. No. 30-5.  
Decided May 24, 1950.

**Order No. 30—Petition Challenging Legality of Amendments—Denial of  
Application for Interim Relief**

Where petitioners, subject to Order No. 30, regulating the handling of milk in the Toledo, Ohio, Marketing Area, filed on April 13, 1950, a petition challenging legality of amendments to Order No. 30, relating to payments to be made to cooperatives upon their request, instead of directly to producers, which were



issued on March 28, 1950, to become effective on May 1, 1950, and said petition was accompanied with an application for interim relief from the operation of the amendments during the pendency of the decision on the merits, the Judicial Officer held that since the petitioners failed to show that they would suffer irreparable damage during the pendency of the proceeding, petitioners' request for interim relief should be denied and the application dismissed.\*

#### **Denial of Application for Interim Relief—Failure to Show Irreparable Damage**

Where petitioners claimed that the damage they may sustain in connection with the payment procedure required by the amendments to Order No. 30 will result from possible cases where a producer will dispute the cooperative's right to collect his payment, and if the producer should be successful in establishing his right to the payment the handler may have to make the payment twice, held, that the claim of possible irreparable damage is untenable, since should such a case arise the handler would always have recourse against the cooperative, and therefore, petitioners' application for interim relief should be denied.\*

*Daniels, Harter and Swope*, Harrisburg, Pennsylvania, for petitioners. *Mr. John M. Durbin* for Production and Marketing Administration.

*Decision by Thomas J. Flavin, Judicial Officer*

#### **DENIAL OF INTERIM RELIEF**

This is a proceeding under Section 8c (15) (A) of the Agricultural Adjustment Act (1933), as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 601 *et seq.*). The petitioners, nine handlers subject to Order No. 30, regulating the handling of milk in the Toledo, Ohio, marketing area, filed a petition on April 13, 1950, challenging the legality of certain amendments to Order No. 30 which were issued on March 28, 1950, to become effective on May 1, 1950 (15 F. R. 1834). With their petition the petitioners also filed an application for interim relief from the operation of certain of the amendments during the pendency of a decision on the merits. The amendments protested are as follows:

"§ 930.2 (c) (10) Upon request, supply on or before the 10th day after the end of each delivery period to each cooperative association with respect to each producer specified in § 930.7 (a) the amounts of milk received, the average butterfat tests thereof, the amounts of authorized deductions and such other information necessary to carry out the provisions and intent of § 930.7. \* \* \*

"§ 930.7 (a) *Time and method of final payment.* (1) On or before the 13th day after the end of each delivery period, each handler shall, upon request, pay to a cooperative association with respect to milk of producers for which it has received written authorization to collect payment a total amount not less than the sum of the individual amounts otherwise payable to such producers pursuant to subparagraph (2) of this paragraph.

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

"(2) On or before the 15th day after the end of each delivery period, each handler shall pay each producer (other than those specified in subparagraph (1) of this paragraph) for milk received from him during such delivery period, at not less than the uniform price for such handler adjusted by the butterfat differential pursuant to paragraph (c) of this section, less the amount of payment made pursuant to paragraph (b) of this section.

"(b) *Partial payments.* (1) On or before the last day of each delivery period, each handler shall, upon request, pay to a cooperative association with respect to milk received during the first 15 days of the delivery period from producers specified in paragraph (a) (1) of this section, a total amount not less than the sum of the individual amounts for such producers, computed at not less than the uniform price for such handler for the preceding delivery period.

"(2) On or before the last day of each delivery period each handler shall pay to each producer (other than those specified in subparagraph (1) of this paragraph) for milk received from him during the first fifteen (15) days of the delivery period at not less than fifty cents (50¢) under the uniform price for such handler for the preceding delivery period: *Provided*, That in the event a producer discontinues shipping to the market during the delivery period, such partial payments shall not be made and full payment for all milk received from such producer during the delivery period shall be made pursuant to the provisions of paragraph (a) of this section. \* \* \*

"§ 930.9 (c) Upon request the market administrator is authorized to report to any cooperative association qualifying under paragraph (b) of this section for each delivery period the amount of butterfat shortage or overage in member milk found in any handler's plant, as revealed by the records of the market administrator. For the purpose of this report, the butterfat shortage or overage on member milk shall be determined as the percentage of total butterfat shortage or overage which total receipts of butterfat in member milk is of the total receipts of butterfat in the plant."

An answer to the application for interim relief was filed by the Assistant Administrator, Production and Marketing Administration, on May 2, 1950. Oral argument was held before me on May 8, 1950, following which both parties filed briefs.

We are not here concerned with the legality or illegality of the contested amendments. The only question properly presented at this time is whether petitioners will be irreparably damaged by compliance with the provisions of the amendments during the time it may take to render a decision on the merits. *In re Babcock Dairy*, 8 A. D. 7; *In re Admiral Potato Corp.*, 7 A. D. 1158; *In re Babcock Dairy*, 7 A. D. 439; *In re Orrville Milk Condensing Company*, 6 A. D. 752; *In re Avon Dairy*, 5 A. D. 817.

The petitioners are mainly concerned with the provisions requiring the handlers to make payments to a cooperative association with respect to milk of producers for which it has received written authorization to collect payments. Aside from arguments as to the invalidity of such provisions, the petitioners contend that they will suffer irreparable damage if the application for interim relief is not granted pending a final decision upon the merits. About the only damage

claimed is that there will be cases where a producer disputes the cooperative's right to collect his payment and that if the producer should be successful in establishing his right to the payment, the handler may have to make the payment twice. Another reason given is that the payment procedure required disrupts a long-standing industry practice of paying the producers direct. .

With respect to cases of possible future disputes as to whether the cooperative or the individual producer is entitled to a payment and the producer should be successful in litigation or otherwise after a handler has paid the cooperative, the handler would always have recourse against the cooperative whether or not a bond is supplied by the cooperative. Neither this nor the other argument are convincing that the petitioners will suffer irreparable damage during the pendency of the proceeding unless they are granted interim relief.

We see no way in which the petitioners would be irreparably damaged by complying with sections 930.2 (c) (10) and 930.9 (c). These amendments merely require the market administrator to release certain information to the cooperative associations after a determination has been made that the cooperative is a qualified cooperative association. Any incidentals which might result from the release of this information would not, in our opinion, subject the handler to irreparable damage.

The petitioners' request for interim relief is denied and the application is dismissed.

(No. 2435)

*In re* THE BABCOCK DAIRY COMPANY ET AL. AMA Doc. No. 30-4.  
Decided May 26, 1950.

#### **Dismissal—Withdrawal of Complaint**

Complaint to review action of the market administrator dismissed upon request of complainant.

*Messrs. Daniels, Harter and Swope*, Harrisburg, Pennsylvania, for petitioner.  
*Mr. John M. Durbin* for Production and Marketing Administration.

*Decision by Thomas J. Flavin, Judicial Officer*

#### **ORDER OF DISMISSAL**

This is a proceeding arising under Section 8c (15) (A) of the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 601 *et seq.*). The petitioners have filed an application to withdraw their petition. The respondent has consented thereto. The petitioners' request is granted and the petition is considered as withdrawn.

(No. 2436)

*In re* MARKET AGENCIES AT OMAHA UNION STOCK YARDS, OMAHA, NEBRASKA. P&S Doc. No. 143. Decided May 3, 1950.

**Increase in Rates and Charges**

Inasmuch as parties are agreed and no objection has been raised, respondents' petition of March 31, 1950, requesting that they be authorized to put into effect a new schedule of rates, granted.

*Mr. John J. Murray* for Livestock Branch, Production and Marketing Administration. *Mr. C. W. Winkler*, of Omaha, Nebraska, for respondents.

*Decision by Thomas J. Flavin, Judicial Officer*

**CONSENT ORDER**

This is a rate proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*). The respondents are presently operating under a temporary order dated February 9, 1950 (9 A. D. 201), which continued a previous order dated March 21, 1949 (8 A. D. 252), in effect to and including March 31, 1951.

On March 31, 1950, respondents filed a petition requesting that they be authorized to put into effect a new schedule of rates. Notice of this petition was published in the Federal Register on April 11, 1950 (15 F. R. 2037), and an opportunity afforded all interested persons to be heard in the matter. No objection to the action petitioned for was received. The Livestock Branch filed an answer recommending that the petition be granted.

Accordingly, the respondents are authorized to put into effect a new tariff which shall be the same as the proposed tariff published in the Federal Register on April 11, 1950 (15 F. R. 2037), with the exception that under Section F, "Buying Charges," the maximum charge for each 250 head (other than by rail) shall be "\$30.00."

The respondents, who must prepare for and be ready to comply with this order on its effective date, wish to have it become effective as soon as possible. All interested persons have been afforded a period of 15 days during which to be heard in the matter. The Packers and Stockyards Act provides that no order of this nature shall be effective in less than five days after the date thereof. Any undue delay in making this order effective may adversely affect marketing facilities. Accordingly, good cause is found for making it effective in less than 30 days.

This order shall become effective on the sixth day after its date and remain in effect until June 1, 1951, unless changed by further order before that date. It is issued subject to all the terms and conditions

of the stipulation filed July 26, 1943, as modified, including the provisions with respect to financial and statistical reports.

Copies hereof shall be served upon the parties by registered mail or in person.

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(No. 2437)

*In re* MARKET AGENCIES AT THE SIOUX CITY STOCK YARDS, SIOUX CITY, IOWA. P&S Doc. No. 308. Decided May 3, 1950.

**Modification of Rates and Charges—Order on Reconsideration**

On reconsideration of the order of January 30, 1950, the rates and charges prescribed in the prior order are modified in five minor respects as requested in petition of respondents.\*

*Mr. Elmer J. Scott* for Livestock Branch, Production and Marketing Administration. *Mr. Ashley Sellers*, of McFarland and Sellers, Washington, D. C., for respondents.

*Decision by Thomas J. Flavin, Judicial Officer*

**ORDER ON RECONSIDERATION**

On April 14, 1950, respondents in this rate proceeding under the Packers and Stockyards Act, 1921 (7 U. S. C. 181 *et seq.*), filed a petition for reconsideration of the decision and order entered on January 31, 1950 (9 A. D. 4). The petition presents a schedule of rates and charges differing from that prescribed in the decision and order only in the following respects: (1) a change from 85 cents to 90 cents per head in the rate for selling and reselling cattle for each head over 15 in each consignment; (2) a change from 31 and 26 cents, respectively, per head to 32 and 27 cents, respectively, in the last two brackets of the charges for selling and reselling hogs; (3) a change from 12 and 6 cents, respectively, per head in the last two brackets of the charges for selling and reselling sheep to 13 and 7 cents, respectively, and a change in the maximum rate for consignments of sheep arriving by rail in double deck cars from \$27 per car to \$28 per car; (4) the prescribing of maximum buying charges for hogs which was not done in the order of January 31, 1950, and (5) the prescribing of a special charge for handling livestock that is crippled, suspects, condemned, etc., which was not done in the order of January 31, 1950.

The Livestock Branch filed an answer stating that the two changes numbered (4) and (5) above suggest provisions which are usually contained in market agency tariffs and which must have been over-

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

looked by the parties in this proceeding. As to the slight per head increases in (1), (2) and (3), the answer states that only \$29,000 additional revenue would ensue and that this would not push the ordered rates beyond the zone of reasonableness. The answer concludes that, while the Branch does not concede the validity of the arguments advanced in support of the petition for reconsideration, it does not oppose the issuance of an order adopting the changes requested if the Judicial Officer believes such changes warranted.

The petition for reconsideration recites a number of errors in the decision and order of January 31, 1950, and states that the requested changes will compensate in part for these errors. It is not necessary to set out the claims of error and evaluate them because some of them have some merit and the requested changes are only slight modifications of the ordered rates. Accordingly, we think the requested changes should be prescribed. Instead of repeating the entire schedule here with the slight changes, only the changes from the schedule ordered January 31, 1950, are given below.

Pursuant to the suggestions in the decision and order of January 31, 1950, a stipulation has been filed in the proceeding covering the form of the reports to be filed by respondents with the Secretary. The stipulation and form of report in the record of the proceeding are approved and need not be set out here.

The following changes are made in the schedule of rates and charges set out in Paragraph 236 of the decision and order entered January 31, 1950:

(1) Under the heading "Selling and Reselling Charges" for cattle, change ".85 per head" to ".90 per head" and insert the following after the charge for "Bulls" and before the charges for "Hogs":

"T. B. Reactors, Bangs Reactors, Cripples, Suspects or  
Subjects, or Condemned..... \$1.50 per head"

(2) Under the heading "Selling and Reselling Charges" for hogs, change ".31 per head" and ".26 per head", respectively, to ".32 per head" and ".27 per head", respectively, and insert the following at the end of the charges for hogs:

"Boars, Cripples or Subjects..... \$0.65 per head"

(3) Under the heading "Selling and Reselling Charges" for sheep, change ".12 per head" and ".06 per head", respectively, to ".13 per head" and ".07 per head", respectively, change the figure "\$27" to "\$28", and insert the following:

"Cripples or Subjects..... \$0.65 per head"

(4) Change that part of the schedule headed "Buying Charges" to read as follows:

**"BUYING CHARGES"**

"Subject to the maximum charges given below, the charges for buying any species of livestock shall be the same as the selling or reselling charges for that species, except that no charge shall be made on account of extra drafts. When, however, it is necessary for the agency to pick up the PURCHASE ORDER from more than three other agencies and/or dealers, a charge of \$.50 shall be made for each market agency and/or dealer over three from whom the PURCHASE ORDER is picked up.

"The maximum charge on any purchase order of hogs shipped out by rail shall be \$21 for each single deck car and \$28 for each double deck car.

"For each 28,000 pounds or fraction thereof in each purchase order of hogs shipped out by truck, the maximum charge shall be \$21 for the first 17,000 pounds, plus \$.27 times the excess weight between 17,000 pounds and 28,000 pounds divided by the average weight of the hogs in the purchase order, with a maximum of \$28 for each 28,000 pounds."

In view of the corrections made herein as a result of the petition for reconsideration, the changes prescribed herein may be made effective upon ten days' notice.

Copies hereof shall be served upon the parties by registered mail or in person.

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(No. 2438)

**PETER VREEKEN v. VALLEY LIVESTOCK MARKETING ASSOCIATION. P&S**  
Doc. No. 1849. Decided May 4, 1950.

**Dismissal—Failure to Show Lack of Just, Reasonable, or Nondiscriminatory Practices**

Where complainant delivered a diseased sow to defendant for handling and sale on a commission basis and, because of this fact, defendant could find no buyer for it, and, having no contrary instructions followed the general usage of the trade in disposing of sick or crippled animals by selling "subject", it is held, that a sale "subject" is not an unjust, unreasonable, or discriminatory practice and, therefore, plaintiff's complaint for alleged damages should be dismissed.\*

**Consignee as Constituting Factor**

Where complainant delivered a sow to defendant for handling and sale on a commission basis, held, defendant became a factor with respect to the animal.\*

*Messrs. Milham & Baer, of Placerville, California, for complainant. Mr. L. W. Feldmiller of Stockton, California, for respondent. Mr. Charles F. Lawrence, Presiding Officer.*

*Decision by Thomas J. Flavin, Judicial Officer*

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

## PRELIMINARY STATEMENT

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*).

On May 7, 1949, Peter Vreeken, Placerville, California, filed a formal complaint claiming reparation in the amount of \$49.60 from Valley Livestock Marketing Association, Union Stockyards, Stockton, California. Valley Livestock Marketing Association, a cooperative association, is registered with the Secretary of Agriculture to buy and sell all species of livestock as a dealer and as a market agency at Union Stockyards, Stockton, California, which is a "posted" stockyard.

The complaint states that after three o'clock on February 7, 1949, complainant delivered three sows to defendant at Stockton, California; that these animals were delivered for immediate sale by defendant on a commission basis with "no special terms or agreements"; that two of the sows were sold on February 7, 1949, and the third held over for sale the next day; that the third sow was sold by defendant subject to post mortem examination; that complainant received no proceeds from the disposition of the third hog but on the contrary was billed for the killing charges by defendant in the amount of \$4.13. With regard to defendant's responsibility for complainant's damage the complaint reads in part as follows:

"(1) In turning over to Orvis and Clinger, meat packers, for slaughter, on 'subject' basis and at no price, an animal left with defendants for cash sale;

"(2) After finding that animal could not be sold (as is claimed by defendants) in failing to notify the complainant to pick up the animal;

"(3) In failing for three weeks after delivery of the animal to the Defendant to notify the complainant of defendants' disposition of the animal, and then upon his making request for remittance of the proceeds making a demand upon him for money;

"(4) In failing to provide complainant with any proof that his animal had been condemned."

Defendant's answer filed by L. W. Feldmiller, General Manager, reads in part as follows:

"The sale of subject livestock is of great importance to a commission firm operating on a central market. A hearing on this complaint may serve to establish the future policy with regards to such sales."

In the light of the pleadings it appears that there is no question with respect to the facts involved. The gravamen of the complaint is an alleged unfair, unjust or unreasonable practice on the part of the defendant.

An oral hearing was held at Stockton, California, on November 9, 1949. Complainant appeared in person and defendant was represented by L. W. Feldmiller, General Manager. Testimony was given



by the complainant, L. W. Feldmiller, T. E. Rochford, Division Manager of the Stockton Union Stockyards and Carl Engelman of the stockyard. Exhibits were received in evidence which establish the truth of the facts described above.

The testimony amounts to no more than immaterial embellishment of the statements of the complaint and answer. Complainant is of the opinion that when defendant's agents found that the sow could not be sold they were under a duty to inform him of the fact and were without authority to dispose of the animal without his approval of such procedure.

#### FINDINGS OF FACT

1. The complainant, Peter Vreeken, is an individual, residing in Placerville, California, and defendant, Valley Livestock Marketing Association, is a cooperative association operating as a registered market agency at the Stockton Union Stockyards, Stockton, California.

2. On February 7, 1949, complainant delivered a sow weighing 310 pounds to defendant without instructions.

3. The sow was diseased and defendant could find no buyer for it. On February 9, 1949, defendant consigned it "subject" to Orvis & Clinger.

4. The sow was slaughtered and condemned, as having gastroenteritis, yielding no salvage value and complainant was billed for killing charges in the amount of \$4.13.

5. The complaint was filed within 90 days after the cause of action accrued.

#### CONCLUSIONS

When complainant delivered the sow to defendant for handling and sale on a commission basis defendant became a factor with respect to the animal. As such, and having no contrary instructions, he was under a duty to act according to the general usages of the trade. It is a practice at this and other stockyards to dispose of sick or crippled animals by selling "subject." The most desirable type of "subject" sale, and the one which is followed at many posted terminal stockyards, is a sale at a specified liveweight price per pound subject to reasonable deductions for condemned parts, special handling, transportation, and slaughter. Proceeds from rendering in excess of proper expenses are remitted to shippers. Apparently this method has not been followed at the Union Stockyards at Stockton, California and, perhaps, may not be practicable at that market.

Complainant has not denied that the sow was sick nor does the record contain anything to arouse doubt as to the truth of defendant's contention in this respect. Damages can only be awarded under the

Packers and Stockyards Act for failure to render just, reasonable, or nondiscriminatory services. The record in this proceeding contains no evidence of a breach of defendant's duty in this respect and so it must be concluded that complainant's claim must be denied and the proceeding dismissed.

### ORDER

The proceeding is dismissed. A copy hereof shall be served upon each of the parties by registered mail or in person.

(No. 2439)

JOHN SHIELDS *v.* J. J. STILLMOCK. P&S Doc. No. 1834. Decided May 5, 1950.

### Reparation—Unjust Practice—Misrepresentation by Seller—Violation of Act

Misrepresentation by a seller who had superior knowledge or means of acquiring such knowledge and knew that buyer would rely upon his statements, is an unjust practice prohibited by section 307 of the act, and entitles complainant to an award of reparation.\*

*Mr. John A. McKenzie*, of Omaha, Nebraska, for complainant. *Messrs. Gross & Welch*, of Omaha, Nebraska, for respondent. *Mr. Harry Wales*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*).

On June 15, 1948, John Shields, Marne, Iowa, filed a formal complaint claiming reparation from J. J. Stillmock, 826 Livestock Exchange Building, at Union Stockyards, Omaha, Nebraska. J. J. Stillmock is registered with the Secretary of Agriculture as a dealer to buy and sell sheep at Union Stockyards, Omaha, Nebraska, which is a "posted" stockyard.

The complaint states that on March 19, 1948, complainant purchased from defendant's agent, W. B. Hanson, at \$18.00 per head, 500 ewes represented to be good solid mouth bred ewes due to lamb within two weeks or 20 days; that a draft in the amount of \$9,000.00 was drawn upon complainant by defendant; that after the draft had been paid by complainant's bank, 498 ewes were delivered; that defendant refunded \$36.00, the value of the two ewes which were not delivered;

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

that the ewes were undernourished and 159 of them died; that only 82 lambs were born of which only 52 lived. The complaint further states that the ewes were misrepresented and that complainant suffered a loss of \$5,207.84 on account of the misrepresentation. In the complaint the accounting set out below is offered in explanation of the total amount claimed:

Cost 498 head ewes at \$18.00-----	\$8,964.00
Plus feed approx. 500 bu. oats at \$1.15-----	575.00
Approx. 7 tons chopped alfalfa hay valued at \$25.00 per ton-----	175.00
Expense 2 trips to Omaha involving 2 days time-----	100.00

Total cost-----	9,814.00
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At the present time, on the other side of the ledger, I have sold

288 ewes—sold Omaha—gross price-----	\$3,196.78
58 ewes—sales ring—net-----	534.39
397 51 ewes—at home @ \$9.00-----	459.00
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52 lambs now weighing from 25 to 40# average @ present market price \$8.00-----	416.00
<hr/>	
4,606.16	
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Total loss-----	5,207.84

The answer states that the 498 ewes delivered were bought on order by W. B. Hanson for complainant's account through defendant; that defendant purchased 1,239 ewes at Union Stockyards, Omaha, Nebraska; that W. B. Hanson sold 498 of these ewes to complainant through defendant; that Hanson and defendant "had been told and informed that said ewes were Nevada ewes and that from said 1,239 head two loads or approximately 500 lamby ewes could be had and further that most of the 1,239 would lamb out"; that the same statements with reference to the ewes were made to complainant and no guarantees, representations, or statements were made other than those made to defendant and Hanson "as to the condition, weight, and nature of said animals"; that the complainant saw and accepted the ewes without making complaint with reference to them until several months after they had been delivered and the draft drawn upon complainant had been honored by his bank.

Despite contradictory statements in the complaint and the answer, it appears clear that the transaction was a sale and purchase agreement rather than a transaction on a commission basis. Upon the basis of complaint and answer it further appears that there is no controversy with respect to the fact that defendant delivered 498 ewes to complainant and was paid \$8,964.00 for said animals. Neither is there any question with respect to the fact that the arrangement was made in the course of a telephonic communication between complainant

and W. B. Hanson, an agent of defendant. In his answer, defendant has pleaded lack of information as to the number of sheep lost or the number that "lambled out" and denied the allegations of the complaint with respect to such facts.

The gravamen of the complaint is an alleged unjust practice on the part of defendant's agent, W. B. Hanson.

An oral hearing was held at Omaha, Nebraska, on August 17, 1949, before Harry Wales, Presiding Officer. John A. McKenzie appeared for complainant, and Harry L. Welch appeared for defendant. Testimony was given by eight witnesses, and a number of exhibits were made a part of the record.

The contract was verbal and made telephonically so that the only direct testimony with respect to the agreement is that of complainant and Hanson which is conflicting. It is necessary, therefore, to look to the circumstantial evidence.

Both men testified that complainant was interested in buying bred ewes. Hanson testified that he told complainant that some of the ewes which he was selling were lambing in the pens and that "the ewes looked like they'd start lambing in about two weeks." Complainant's testimony to the effect that only about 80 of the ewes had lambs after they were delivered to him, and that he had only about 50 live lambs to market is uncontroverted. Neither is there any controversy with respect to complainant's statement as to the disposition of the ewes and the prices received.

#### FINDINGS OF FACT

1. The complainant, John Shields, is a farmer residing near Marne, Iowa, and J. J. Stillmock is a registered sheep dealer at the Union Stockyards, Omaha, Nebraska.

2. On or about March 19, 1948, defendant, through his agent, Walter Hanson, sold to complainant 500 ewes in the course of a telephonic communication between complainant and Walter Hanson.

3. Complainant contracted to buy, and respondent's agent contracted to sell, sound ewes weighing about 150 pounds and due to lamb within 20 days.

4. Four hundred and ninety-eight ewes were delivered to complainant for which he paid \$8,934.00.

5. Most of the ewes were more than four years old, weighed less than 150 pounds, and were in poor condition.

6. About 82 of the ewes had lambs, but only 52 survived.

7. Complainant paid \$8,964.00 for the ewes.

8. The ewes delivered to complainant were not in accordance with the terms of the contract, and complainant suffered damage in consequence of defendant's failure to meet the terms of the contract.

9. The market price of ewes of this class did not vary substantially between the time the ewes were delivered to complainant and July when he sold the last of them at Omaha.

10. Three hundred and ninety-five of the ewes accepted by complainant were sold at public market under competitive marketing conditions.

11. One hundred and three of the ewes accepted by complainant died and were not marketed.

12. Fifty-seven were sold at auction in Dunlap, Iowa, two weeks after they were delivered to complainant, at \$9.75 per head.

13. Two hundred and eighty-eight were sold at Omaha Union Stockyards on May 18, 1948. The animals in this shipment, which contained three crippled and two dead ewes, were sold by weight for \$3,196.79. The average price per head brought by the live uncrippled animals was \$11.26.

14. On July 22, 1948, complainant sold the last of the live ewes at Omaha for \$9.00 per head.

15. The average price per head brought by the live uncrippled ewes was \$10.87.

16. The ewes would have been worth the purchase price of \$18.00 if they had been as represented.

17. The complaint was filed within 90 days after the cause of action accrued.

### CONCLUSIONS

As stated above, the only direct testimony as to the agreement entered into by complainant and defendant's agent is conflicting. However, it is well established that complainant, without having seen the animals but relying on Hanson's representations, entered into a contract to purchase sound bred ewes which would produce a normal lamb crop. The ewes delivered to complainant came from a large band shipped from California to Omaha, Nebraska, for sale as mutton ewes. They were sold to defendant at mutton ewe prices and not as breeding ewe prices. Inasmuch as only 82 of the 498 delivered had lambs, it is obvious that the remainder had not been bred or were not capable of producing lambs. In view of the price at which they were resold by complainant it is clear that they were not sound animals.

Hanson and defendant are experienced sheep men and as such they knew or should have known that the ewes delivered to complainant were not sound bred ewes. These men had opportunity to examine the animals, and complainant, who had requested Hanson to locate the animals for him, had no such opportunity. Accordingly, defendant's agent, having superior knowledge or means of acquiring it and

knowing that complainant would rely on his statements as true, misrepresented the animals. This is an unjust practice and a violation of section 307 of the Packers and Stockyards Act. Therefore, complainant is entitled to an award of reparation.

There remains for consideration the amount of the reparation to be awarded.

The claim contains an item in the amount of \$100.00 for expenses incident to two trips to Omaha alleged to have been necessary in connection with the transaction. The propriety of allowing this item of damage need not be considered here since the damage was not proved at the hearing.

Fifty-two of the 498 ewes produced live lambs and as to these ewes complainant suffered no damage; i. e., they were worth the purchase price of \$18.00. When the animals were delivered or within a reasonable time thereafter he had an opportunity to inspect them and might have rescinded his contract. He did not do this but elected to retain the animals and seek an award of damages. Inasmuch as the animals became his property he is not entitled to recover the cost of feed which they consumed. On the other hand he does not have to account for the proceeds of the sales of the lambs produced after he acquired the ewes.

The measure of complainant's damage is the difference between the market value of the ewes at the time of delivery and the value they would have had if they had been as represented.

Three hundred ninety-five of the 498 ewes accepted by complainant were sold at public markets under competitive marketing conditions (see Finding of Fact No. 10) during the period beginning March 30, 1948, and ending on July 22, 1948 (see Finding of Facts 12, 13, and 14). The market price of ewes of this class and grade did not change substantially while complainant owned the animals (see Finding of Fact No. 9). In view of the number of head sold, the method of marketing and the uniformity of price during the period the average price per head brought by the live uncrippled ewes at the market (\$10.87—Finding of Fact No. 15) provides a reasonable value for each of the sound ewes at the time of delivery to complainant.

Although the complaint states that "159 sheep died," complainant's testimony (Tr. pp. 27 and 28) is to the effect that 101 ewes died at his farm, that one died "on the road in" and another died en route to market with the ewes which were sold on July 22, 1948. Complainant's testimony to the effect that the ewes delivered to him were in poor condition when delivered to him and that about 20 were unable to walk the two miles to his farm is uncontroverted. In view of the high mortality and complainant's testimony with respect to their condition, it seems probable that most of the 103 ewes which died were unsound

when delivered to complainant and so worth less than \$10.87 which has been established as the value of the sound ewes at the time of delivery. However, the record contains no evidence as to how many deaths were due to the condition of the ewes when delivered to complainant or as to how many died from other causes while they were in complainant's possession. Accordingly, for purposes of fixing the amount of reparation to be awarded the ewes which died must be considered to have had the same value at the time of delivery as the ewes which survived and were marketed.

Complainant sustained damage in connection with each of 446 ewes. This damage was the difference between the purchase price of \$18.00 and \$10.87, the reasonable value of each animal at the time of delivery, which is \$7.13. Therefore, complainant is entitled to an award of damages in the amount of \$3,179.98.

### ORDER

The defendant shall pay to the complainant, within 30 days from the date hereof, \$3,179.98 as reparation with interest thereon at the rate of 5 percent per annum from March 19, 1948, until paid.

A copy hereof shall be served upon each of the parties by registered mail or in person.

(No. 2440)

*In re* MARKET AGENCIES AT THE MISSISSIPPI VALLEY STOCK YARDS.  
P&S Doc. No. 1532. Decided May 15, 1950.

### Continuation of Rates and Charges

Inasmuch as the parties are agreed, respondents' petition requesting that the order of June 13, 1949 be extended for a period of two years is granted and, since the prior orders were preceded by a notice of petition published in the Federal Register, it is found that notice and public procedure upon respondents' petition are unnecessary.

*Mr. John J. Murray* for Livestock Branch, Production and Marketing Administration. *Market Agencies at Mississippi Valley Stock Yards, St. Louis, Missouri, pro se.*

*Decision by Thomas J. Flavin, Judicial Officer*

### CONSENT ORDER

This is a rate proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*).

The respondents are presently operating under a temporary order dated June 13, 1949 (8 A. D. 681), authorizing assessment of the current rates until and including June 30, 1950.

On April 21, 1950, respondents filed a petition requesting that the order of June 13, 1949, be extended for a period of two years.

On May 9, 1950, the Livestock Branch filed an answer recommending that the petition be granted.

Inasmuch as the parties are agreed, the petition is granted and the order of June 13, 1949, is continued in effect to and including June 30, 1952.

The schedule of rates currently in effect was authorized by the order of June 13, 1949, which modified and extended a previous order dated June 17, 1948 (7 A. D. 458). Each of these orders was preceded by a notice of petition published in the Federal Register and no protest to either action petitioned for was received. This order merely continues the provisions of the current order in effect for an additional two year period. In view of the foregoing, it is found that notice and public procedure upon the petition of April 21, 1950, are unnecessary.

This order shall be effective on July 1, 1950.

Copies hereof shall be served upon the parties by registered mail or in person.

(No. 2441)

R. A. POOL, D. B. A. POOL LIVESTOCK COMMISSION COMPANY. P&S Doc. No. 1853. Decided May 15, 1950.

#### **Consent Order—Suspension of Registration Held in Abeyance**

Where the order of inquiry charged respondent with wilful violations of various provisions of the act and failed to comply with the terms of a stipulation and agreement entered into with the Secretary, and respondent filed a stipulation consenting to the issuance, without a hearing, of a cease and desist order and to a suspension of his registration for a period of 15 days, respondent's registration is suspended for a period of 15 days, such suspension to be held in abeyance and not to become effective unless respondent, within 2 years from date of order, is again found, after opportunity for hearing, to have violated the act or the regulations thereunder.\*

#### **Cease and Desist—Violations of Act—Books and Records—Depositing of Funds in Separate Bank Account**

Respondent is ordered to cease and desist from engaging in the business of buying and selling livestock as a dealer without registering with the Secretary and furnishing bond in connection therewith; intermingling livestock consigned to him for sale on a commission basis with livestock owned by respondent or a trading partnership composed of respondent and others for purpose of selling respondent's or trading partnership's livestock without obtaining in advance the consent of consignors for such intermingling; making such use of shippers' proceeds funds as would endanger or impair the prompt and

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.



faithful accounting therefor and payment of such funds to proper parties; and, intermingling or confusing shippers' proceeds funds with other accounts or funds of respondent; and respondent is further ordered to (1) keep such accounts, records, and memoranda as will correctly and fully disclose all transactions involved in his business and (2) deposit the gross proceeds received from the sale of livestock handled on a commission basis and any other funds that come into his possession as an agent in a separate bank account which shall be drawn on only for certain specified purposes.\*

*Mr. Jerome S. Ducrest* for complainant. *Mr. Harold G. Baker*, of Baker, Lese-mann, Kagy & Wagner, East St. Louis, Illinois, for respondent.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*). The Order of Inquiry and Notice of Hearing issued by the Acting Director, Livestock Branch, Production and Marketing Administration, charges the respondent with (1) engaging during the year 1948 in business as a dealer at the stockyard, through a trading partnership composed of respondent and Raymond K. Frailey, without having been registered as a dealer with the Secretary and furnishing bond in connection therewith as required by the act and the regulations promulgated thereunder; (2) intermingling livestock consigned to him for sale on a commission basis with livestock owned by the trading partnership without obtaining advance consent of the consignors of the livestock for such intermingling; (3) using funds, during the year 1944, received as proceeds from the sale of consigned livestock by respondent and his clearees for purposes of his own resulting in excessive liabilities over assets and endangering the faithful and prompt accounting of the proceeds of the sales; and (4) failing to comply with a stipulation and agreement ensuing from the violations mentioned in (3) requiring a separate bank account for the proceeds of sales with all withdrawals made in strict compliance with the provisions of section 201.42 of the regulations.

Respondent filed an answer admitting (1) that he had done business as a dealer through the trading partnership but that he did not realize he was required to register as a dealer and furnish a bond, that upon learning so, he immediately discontinued the operations and that Frailey immediately registered as a dealer; (2) that livestock owned by the trading partnership was intermingled with consigned livestock for sale without consent of the consignors, but that it is not possible to yard each consignment of cattle separately and that none of the consignors were adversely affected in any manner by the intermingling;

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

(3) that he entered into the stipulation alleged but that at all times covered by the stipulation he was solvent and had quick assets in excess of his liabilities; and (4) that he used the shippers' proceeds account in the manner alleged, but he explained that he had misinterpreted the applicable regulations and that when these were explained to him, he discontinued the practices complained of in this respect.

No hearing was held. Respondent filed a stipulation consenting to the issuance, without a hearing, of an order requiring him to cease and desist from the practices complained of and ordering a suspension of his registration for a period of 15 days, such suspension to be held in abeyance unless respondent, after opportunity for hearing, is again found to have violated the act or the regulations within a period of two years from the date of the order. Complainant filed a recommendation that the order consented to by respondent be entered. In view of the recommendation of complainant, the order consented to will be entered.

#### FINDINGS OF FACT

1. The St. Louis National Stock Yards, National Stock Yards, Illinois, hereinafter referred to as the stockyard, was at all times mentioned herein a posted stockyard under the provisions of the act.

2. The respondent is registered with the Secretary of Agriculture as a market agency engaged in the business of buying and selling livestock on a commission basis and furnishing clearing and bookkeeping services at the stockyard and at the times of the transactions herein after referred to was so registered.

3. On a number of occasions in 1948, the respondent engaged, through a trading partnership composed of respondent and Raymond K. Frailey, in the business of buying and selling livestock in commerce as a dealer, within the meaning of the act, without having registered as a dealer with the Secretary and furnishing bond in connection therewith as required by the act and the regulations promulgated thereunder.

4. On a number of occasions in 1948, the respondent intermingled livestock consigned to him for sale on a commission basis with livestock owned by a trading partnership composed of respondent and Raymond K. Frailey for the purpose of selling the trading partnership's livestock, without obtaining in advance the consent of the consignors of the livestock for such intermingling.

5. The respondent, on March 10, 1945, pursuant to section 202.5 of the rules of practice (9 CFR 202.5), entered into a stipulation in which he admitted violating the act and the regulations issued pursuant thereto during the year 1944 by (1) having an excess of current liabilities over current assets on October 31 in the amount of \$103,976.33, on November 30 in the amount of \$63,632.13, and on December 31 in

the amount of \$19,948.52, and (2) at various times during that year selling consigned livestock for the account of shippers on a commission basis and using or disposing of the proceeds from the sale of such livestock, as well as the proceeds of sales of livestock sold on a commission basis by the Rogers-Nichols Live Stock Commission Company, the Gene Buechler Live Stock Commission Company, the Dillinger and Son Commission Company, and the Hitz Livestock Commission Company, clearers of respondent, in such a way as to endanger or impair the faithful and prompt accounting to shippers for such funds. The respondent also stipulated that he would establish, separate from the general account in which his own funds were deposited, a bank account in which the gross proceeds of all sales of livestock consigned to him for sale on commission and consigned to agencies whose operations he cleared would be deposited, and that thereafter all withdrawals from the shippers' proceeds bank account would be made in strict compliance with the provisions of section 201.42 of the regulations, and that upon establishment of the shippers' proceeds bank account he would deposit therein, from his own funds, an amount sufficient to offset the shortage in shippers' funds as of that date. The respondent further stipulated that he would cease and desist from committing such violations and agreed that, if in the future he engaged in any practice prohibited by the act, such stipulation would be admissible as evidence of the facts and practices set forth therein in any subsequent proceeding of the Secretary of Agriculture against him under the act.

6. The respondent has failed to comply with the terms of the stipulation and agreement, outlined in Finding of Fact 5, to establish, separate from the general account in which his own funds are deposited, a bank account in which the gross proceeds of all sales of livestock consigned to him for sale on commission and consigned to agencies whose operations he clears are deposited, and that all withdrawals from the shippers' proceeds bank account would be made in strict compliance with the provisions of section 201.42 of the regulations. The account has been drawn upon (1) to pay for livestock purchased on a dealer basis by P. F. Musick, a registered dealer; (2) to pay drafts by country dealers for livestock purchased by them and shipped to respondent for resale; (3) to finance order purchases of livestock on a commission basis for the accounts of various buyers; and (4) to finance dealer transactions of a trading partnership composed of respondent and Raymond K. Frailey.

7. The respondent failed to keep such accounts and records as fully and correctly disclose all transactions involved in his business as a market agency in that entries were made by respondent in a single cash book and merely show daily totals of purchase and sale transactions instead of the individual transactions of the respondent and his three

clearees, Rogers-Nichols Live Stock Commission Company, Gene Buechler Live Stock Commission Company and W. S. Jenkins and Company.

### CONCLUSIONS

By reason of the facts stated in Finding of Fact 3, the respondent has violated sections 303, 307 and 312 (a) of the act and sections 201.10 and 201.27 of the regulations issued pursuant thereto.

By reason of the facts stated in Finding of Fact 4, the respondent has violated sections 307 and 312 (a) of the act and section 201.58 of the regulations issued pursuant thereto.

By reason of the facts stated in Finding of Fact 5, the respondent has violated sections 307 and 312 (a) of the act and sections 201.40 and 201.41 of the regulations issued pursuant thereto.

### ORDER

The respondent R. A. Pool, his agents and employees shall cease and desist from the following:

1. Engaging, individually or in partnership with others, in the business of buying and selling livestock in commerce as a dealer, within the meaning of the act, without having registered as a dealer with the Secretary and furnishing bond in connection therewith as required by the act and the regulations promulgated thereunder.

2. Intermingling livestock consigned to him for sale on a commission basis with livestock owned by the respondent or by a trading partnership composed of respondent and others, for the purpose of selling the respondent's or the trading partnership's livestock, without obtaining in advance the consent of the consignors of the livestock for such intermingling.

3. Making such use of funds received as proceeds of sale from the sale of livestock handled on a commission basis as would in any manner endanger or impair the prompt and faithful accounting therefor and payment of such funds to the person entitled thereto.

4. Intermingling or confusing funds received as proceeds of sale of consigned livestock with other accounts or funds belonging to the respondent.

Respondent shall deposit the gross proceeds received from the sale of livestock handled on a commission basis and any other funds that come into his possession as an agent in a bank account separate from the general account in which his own funds are deposited. Such account shall be drawn on only for the payment of the net proceeds due to the person or persons entitled thereto, for the payment of sums due the respondent as compensation for his services, and for the payment of lawful marketing charges.

Respondent shall keep such accounts, records and memoranda as will fully and correctly disclose all transactions involved in his business.

Respondent's registration is suspended for a period of 15 days. However, such suspension shall be held in abeyance and shall not become effective unless respondent, within two years from the date of this order, is again found, after opportunity for hearing, to have violated the act or the regulations thereunder.

(No. 2442)

GILBERT R. SMITH *v.* UNION STOCK YARDS COMPANY. P&S Doc. No. 1815. Decided May 25, 1950.

**Dismissal—Stockyard Services—Refusal to Assign Pen Space—Failure to Prove Violation of Act**

Since the facts fail to prove that respondent stockyard company violated the act by refusing to allot pen space to complainant to operate as a market agency, the complaint filed in this proceeding is dismissed.

**Registrant's Right to Pen Space**

Mere registration as a market agency does not automatically force a stockyard company under any and all conditions to provide registrant with facilities to do business.

*Messrs. Keith V. Williams, Frank B. Williams, and R. Jasper Smith, of Springfield, Missouri, for complainant. Messrs. Roscoe C. Patterson and Fred A. Moon, of Springfield, Missouri, for respondent. Mr. John J. Curry, Hearing Examiner.*

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a proceeding under the Packers and Stockyards Act, 1921 (7 U. S. C. 181 *et seq.*) Gilbert R. Smith filed a complaint against the Union Stock Yards Company, Springfield, Missouri, a stockyard subject to the provisions of the act. Smith has been operating at the stockyard as a registered dealer under the act since 1939. On October 1, 1948, he registered with the Secretary of Agriculture also as a market agency to buy and sell cattle, sheep, goats and swine on a commission basis. However, the Union Stock Yards Company has refused to allow him yard space to conduct such a business. In general, the company takes the position in its answer and throughout the proceeding that it does not have available space for Smith and that to give him space would penalize or inconvenience the existing six commission firms doing business at the stockyard.

A hearing was held in Springfield, Missouri, commencing on November 4, 1948. After a postponement, the hearing was resumed on January 31, 1949. There were 381 pages of testimony taken and numerous exhibits were received in evidence. John J. Curry, Office of Hearing Examiners, presided at the hearing. Following the hearing, the parties submitted suggested findings of fact, conclusions, etc. The examiner issued his report on July 12, 1949, recommending that it be found that complainant had failed to sustain the burden of showing that respondent had violated the act. Complainant filed exceptions to the report and asked for oral argument upon his exceptions. After several attempts to schedule a satisfactory date for oral argument, the argument was finally held before me in Washington, D. C., on February 6, 1950.

So that what follows hereinafter may be brought into focus, the pertinent provisions of the act are given here. Section 304 of the act (7 U. S. C. 205) reads in part as follows:

"It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: \* \* \*

Section 307 (7 U. S. C. 208) is as follows:

"It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful."

The term "stockyard services" is defined in section 301 (b) (7 U. S. C. 201 (b)) to mean:

" \* \* \* services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock;"

#### **The Pleadings**

The complaint states in general that Smith applied for an allocation of pen and yard space but was turned down for the specious reason that existing space did not provide adequate room for him to operate as a commission man. Smith claims in the complaint that in 1944 eight commission firms operated at the yards, that in 1946 seven commission firms so operated, that six firms now operate and that the volume of livestock marketed in the near future will not be as great as in the years when more than six firms operated. The complaint recites also that, at the time respondent was considering his request for space, respondent solicited the Missouri Farmers Association, a cooperative commission agency, to bring its business to the respondent's yards from the location in which it did business, that there is an

unused alley in the hog house, that complainant has office space as a trader which could be used for his commission business, that respondent is engaged in a program of expanding pen and alley space, that complainant is responsible financially and has offered to procure any bond necessary, that he has never violated the act, and that numerous farmers and traders have requested him to engage in the commission business at the yards because the existing firms do not have the necessary personnel and facilities to clear shipments expediently. The complaint also contains a statement that complainant had tried several times to purchase all or a portion of one of the existing firms but does not feel he should comply with the excessive and inordinate demands of the firms.

The complaint names only the Union Stock Yards Company as a respondent. It does not join the other existing commission firms, comprising the Livestock Exchange, as respondents and does not charge any illegal agreement or collusion on the part of respondent and these firms.

The answer filed by respondent admits that Smith asked for but was not given yard space as a commission man, admits that the Missouri Farmers Association was invited to come to respondent's yards but explains that this invitation was made in connection with expansion plans for the yards and that it would bring new business approximating 24 percent of the business done by respondent justifying investment of the additional capital needed to provide the necessary space for this amount of new business. The answer also claims that the yards and facilities of respondent have been overcrowded and congested for years, that respondent has planned and is effectuating an expansion to relieve the congestion and that addition of another firm will offset the benefits to be gained by the expansion of space and facilities.

#### **The Hearing**

At the sessions of the hearing held on November 4 and 6, 1948, complainant testified for himself and called as witnesses Carl Murray, a farmer; Rancie V. Burch, a cattle buyer at the Union Stock Yards; Carl Gates, manager of the Missouri Farmers Association Stock Yards, Springfield, Missouri; Murley Parker, livestock auctioneer; Lee McLean, a commission agent at Union Stock Yards and president of the Exchange; Jim Carr, a trader at Union Stock Yards; Willis Case, an auctioneer of Marshfield, Missouri; John J. Clendenin, District Supervisor, Packers and Stockyards Division, Livestock Branch, Production and Marketing Administration, United States Department of Agriculture; and Bill Davenport, Verona, Missouri, farmer and livestock trader.

The complainant described his efforts to obtain pen and yard space to operate as a commission agency and he set out his belief that there was available space with which to accommodate him. With respect to pen space for handling cattle, complainant testified that he thought he would have to be allotted space in an alley with another firm. He admitted that the yards were congested the first three days of the week from June to January. He seemed to attribute the congestion to lack of sufficient weighing facilities but admitted that the unloading decks were crowded and he was of the opinion that increased pen space and alleys, then in the process of construction, would relieve the situation. Murley Parker, Jim Carr, Willis Case and Bill Davenport expressed the opinion that there was room for one more commission firm at the yard. Some of these witnesses thought another commission firm would speed the flow of livestock through the yard and that two firms could operate in one alley if there were sufficient room. Most of the witnesses for complainant admitted that there was congestion in the yard on the first three days of the week. Some admitted this was true at the time of the hearing when part of respondent's reconstruction of the yard had been completed. Jim Carr testified that he and other traders around Marshfield, Missouri, would give their business to complainant if he engaged in the commission business at the stockyard.

The respondent put on a number of witnesses who testified to congested conditions at the yard because of lack of available space to handle the cattle delivered for marketing. These witnesses included J. E. Hamilton, farmer and dealer in livestock, Springdale, Arkansas; Ward Haguewood and Charles Jordan, checkers at the yard; Thomas W. Orr, formerly in the commission business at the yard for many years; Adrian D. Orr, Jr., and Sears Soapes, hog salesman for existing commission firms at the yard; and Floyd Stafford, respondent's general manager. Most if not all of these witnesses were of the opinion that two firms to one alley would impede the flow of cattle through the yard rather than speed it up. Paul J. Bennett, marketing specialist, Packers and Stockyards Division, Livestock Branch, Production and Marketing Administration, United States Department of Agriculture, assigned to the Kansas City District Office, also expressed this viewpoint and testified that many of the yards are getting away from having more than one firm to an alley. Knial Cassee, in the commission business at the yard occupying an alley, contrasted his former difficulties when his firm shared an alley with another firm and he thought also that two firms in one alley slow down operations because of confusion in the alley, etc.

Testimony from respondent's witnesses and witnesses called by complainant in rebuttal brought out information concerning complain-



ant's efforts to purchase an interest in one of the existing firms. While complainant was seeking to get space to operate as a commission firm, complainant was to be aided by the existing firms in purchasing the one-third interest of Adrian Orr, Jr., in the Owens & McLean Livestock Commission Company. Joe Shipman, a commission man at the stockyard and a member of both the Board of the Livestock Exchange and respondent's Board of Directors, was said to have promised complainant that each of the five firms other than Owens & McLean would contribute \$1,000 each to reimburse complainant partly for the \$10,000 price for Orr's interest in Owens & McLean. The deal did not materialize as promised and complainant resold the interest at a loss of \$1,500. The precise reasons for complainant's resale do not emerge from the evidence. That is, we cannot tell from the evidence whether complainant resold because he did not get reimbursed as promised or because he did not get transferred to him the shares of membership in the Livestock Exchange represented by the interest in the firm purchased. Complainant also testified that Shipman told him that it would be a good idea to go ahead with the hearing upon his complaint under the act because it would be an "easy" hearing, that complainant would not have "to fight it too hard," and that it would be "settled once and for all that there was not adequate space in the Union Stock Yards for another firm." There also was evidence that complainant had negotiated to purchase for \$7,500 the interest of Sears Soapes in an existing firm but this deal also did not materialize because Soapes refused to agree that he would not thereafter engage in the livestock commission business for a period of years.

#### Discussion and Clarification

We think it appropriate to dispose of, at the outset, the suggested findings and conclusions of complainant to the effect that the respondent entered into a combination, collusion or conspiracy with the six existing commission firms unlawfully to exclude complainant from the commission business at the stockyard. The complainant did not choose to make these firms respondents in this proceeding and did not charge any such illegal combination in his complaint. There is no direct evidence in the proceeding on this point. Following the hearing, the complainant asked that an inference or conclusion of unlawful collaboration with the existing firms should be drawn from certain evidence in the record. This evidence consists mainly of (1) the opportunity for such a scheme because two directors out of six on the Board of the Livestock Exchange are two of the seven directors on respondent's Board of Directors and because of the fact that some of the shares of respondent's stock (about one-ninth) are owned by the existing firms, (2) the "kangaroo" sale, described above, of a one-third

interest in Owens & McLean to the complainant, and (3) the fact that the Livestock Exchange hired an attorney to join with respondent's attorney in defending against the complainant's complaint. These and one or two other pieces of evidence show that the existing firms were interested in preventing the entry of another firm into the commission business. There are hints that the respondent may have cooperated. But we cannot agree that there is sufficient evidence of a substantial nature for us to conclude that *respondent* engaged in any unlawful combination, collusion or conspiracy with the Livestock Exchange to exclude complainant. As we have stated, the evidence does involve the Livestock Exchange, comprising persons not parties to this proceeding, to some extent. But whether their actions were lawful or unlawful, that is whether they were unjustifiably attempting to restrain competition rather than to prevent undue inconvenience or disadvantage which might be caused by sharing space at the stockyard, is a question which we ought not to decide in this proceeding to which they were not parties. Therefore in the subsequent parts of this decision and order, we do not go further into findings of fact and conclusions upon this aspect of the case.

Neither party sought reopening of the hearing to show conditions at the stockyard after the close of the hearing. From the time complainant applied for space until the hearing, respondent, while operating the stockyard, was at the same time in the process of tearing out old facilities and replacing these with new facilities. This expansion program was not completed at the time of the hearing. This is the general framework within which must be decided the question as to whether respondent was compelled by the act to grant space to complainant.

#### FINDINGS OF FACT

1. The complainant, Gilbert R. Smith, is registered with the Secretary of Agriculture as a dealer and has been engaged in business as a trader and speculator at the Union Stock Yards, Springfield, Missouri, since 1939. On October 1, 1948, he obtained a registration certificate to engage in business on a commission basis and filed a bond with the respondent, Union Stock Yards Company.

2. The respondent, Union Stock Yards Company, owns and operates the Union Stock Yards, Springfield, Missouri, which is a stockyard posted under the provisions of the Packers and Stockyards Act.

3. On or about January 8, 1948, and thereafter, the complainant requested the respondent that he be furnished facilities at the stockyard to the end that he might engage in the business of handling livestock on a commission basis.

4. The respondent, first by its general manager in January 1948 and later by action of its Board in April 1948, informed the complainant that there was no available yard space at its stockyard which could be assigned to him for use as a market agency.

5. Complainant sought out Dr. Behler, District Supervisor, Packers and Stockyards Division, Livestock Branch, Production and Marketing Administration, United States Department of Agriculture, who inspected respondent's premises and discussed the question of granting space to complainant with respondent's general manager Floyd Stafford. Thereafter Dr. Behler, who has since retired from Government service and did not appear at the hearing, sent the following letter to respondent.

"Reference is made to the request of Mr. Gilbert R. Smith to have pens allotted to him by the Union Stock Yards Company, Springfield, Missouri, and other facilities and services furnished for the purpose of engaging in the commission business at that yard.

"On my last trip to Springfield I discussed this matter with Mr. Stafford. I advised Mr. Stafford that if pens were available that in consideration of the apparent responsibility of Mr. Smith, his father, and perhaps brothers, pens should be furnished him for the purpose of engaging in the commission business. However, Mr. Stafford informed me that no pens were available at that time. Today I am in receipt of a letter from Mr. Gilbert R. Smith informing me that the Union Stock Yards at Springfield has asked the M. F. A. Stockyards to move its business to the Union Stock Yards and that it would furnish pens and scale facilities as well as office space to accommodate the business of that cooperative. Of course, I am not familiar with the details of any negotiations between the M. F. A. and the Union Stock Yards with the view to the former transferring its business to the Union Stock Yards.

"However, I again wish to reiterate that since, according to the statements of Mr. Stafford and others with whom I talked on the Springfield market, Harry H. Smith & Sons are financially and otherwise responsible and the Union Stock Yards at Springfield, Missouri has pens available to be allotted to Harry H. Smith & Sons for the purpose of engaging in the commission business, it is my advice that such pens be provided these operators since failure to do so could be considered as discriminatory.

"I shall appreciate hearing from you in this matter."

6. For several years prior to complainant's application for space, the Union Stock Yards was crowded and congested mainly during the first few days of the week during the latter half of the year. Although there were other contributing factors, the principal cause was too large a volume of livestock for the facilities of the stockyard. During 1944, eight commission firms operated at the yard. In 1945 one of the eight firms sold out either to one of the other firms or to the other firms as a group. Later in 1945 one of the seven remaining firms was bought out by the other firms comprising the Livestock Ex-

change. Since that time there have been six commission firms operating.

7. Prior to the time the complainant applied for space as a commission firm, the respondent had initiated a program of rebuilding and expansion. In connection with this program, it invited on several occasions the Missouri Farmers Association to return to respondent's stockyard with its business. The Missouri Farmers Association had once operated at respondent's stockyard but for some years had been doing business at another location in the Springfield, Missouri, area. Respondent had lost considerable business to the Missouri Farmers Association because of long delays in getting livestock unloaded from trucks at respondent's stockyard. At the time the invitations were made to Missouri Farmers Association, the respondent had not finally completed its expansion plans which called for one commission firm per alley in the cattle division.

8. The Missouri Farmers Association turned down the respondent's bid for bringing its business to the respondent's stockyard. At the time of the hearing, the respondent had completed four new enlarged alleys in the cattle division and the six existing commission firms were doing business in these alleys, some alleys of course being used by more than one firm. The respondent's plans called for, as stated above, six alleys. The six new alleys are larger than the old alleys by one-third to one-half and are an improvement also over the old alleys in the manner in which they are laid out. The new construction adds approximately 60,000 additional square feet of space.

9. During the pendency of the complainant's application for space up to the time of the hearing, the respondent was engaged in remodeling the stockyard while at the same time operating it. There was no available space in the cattle division, the hog house or the sheep house which was not assigned to and being used by the existing firms except one alley in the hog house which was used by all the firms for overflow.

10. Over the years, the respondent had a gradual increase in overall business at the stockyard. As is the case with most stockyards, the arrivals are largely by truck in recent years whereas years ago the arrivals were mainly by rail. As shown by the information contained in the annual reports filed by the respondent for 1944, 1945, 1946, 1947, and 1948, the following table reflects the initial yardage collected by the yard company with respect to all species of livestock:

	1944	1945	1946	1947	1948
Cattle.....	117,336	144,037	135,203	156,609	132,886
Calves.....	95,049	104,870	108,254	159,566	145,330
Hogs.....	233,945	115,200	112,432	135,455	188,021
Sheep and goats.....	128,906	122,134	115,271	98,720	99,607

11. During 1948 the six commission firms at the Union Stock Yards handled the following volume of business on a commission basis:

	Cattle	Calves	Hogs	Sheep and goats	Bulls
<b>Firm A:</b>					
Truck.....	34,362	34,444	26,390	26,607	
Rail.....	403	110	92	792	
<b>Firm B:</b>					
Truck.....	24,102	29,160	28,157	24,779	
Rail.....	4,055	404			
Resales.....	2,568	1,113	86	308	
<b>Firm C: Truck</b> .....	15,502	19,641	29,969	12,783	
<b>Firm D:</b>					
Truck.....	15,521	16,333	40,204	8,459	176
Rail.....	341				
Dealer sales.....	909	250	416	1,256	2
<b>Firm E:</b>					
Truck.....	16,321	14,630	13,799	12,226	100
Resales.....	246	91	25	83	1
Truck.....	2,739	1,249	3,625	905	125
Resales.....	69	18			3
<b>Firm F:</b>					
Initial sales.....	15,372	13,166	12,929	12,048	
Resales.....	363	317	135	221	

12. The testimony as to whether more than one commission firm per alley is objectionable from the standpoint of efficient handling of live-stock is opinion testimony and is in conflict. However, there is evidence that most stockyards are getting away from having more than one firm per alley in order to expedite the handling of livestock through the stockyard.

13. It is not possible to ascertain how much business complainant would have if he should be granted space. About the only evidence on this subject is the testimony of Willis Case that he “. . . and other traders around the vicinity of Marshfield” would give their business to the complainant although presumably some of the other witnesses appearing for the complainant might send him some business.

14. The complainant is financially responsible and there is no evidence of any undesirable personal or business traits or practices.

### CONCLUSIONS

First, there is no question raised as to the jurisdiction of the Secretary of Agriculture in this matter under the act. Several cases, the latest of which is *Carpenter-Walsh Commission Company v. Sioux City Stockyards Company*, 49 F. Supp. 801 (1943), establish such jurisdiction.

However, after close study of the record, including the complainant's exceptions to the examiner's report and the oral argument thereon, we arrive at the same basic conclusion as the examiner, namely, that the complainant has not sustained the burden of proving nonobservance or violation of the act by the respondent.

The complainant is seeking entry into the commission business through the use of facilities owned by the respondent. He has not

shown that there is an insufficient number of selling agencies at the stockyard, that is, that the number of existing firms is not "reasonable" for the amount of business at the stockyard. With respect to available space during the pendency of the application, he sought additional space when the facilities were overtaxed. His evidence concerning the sharing by two or more firms was outweighed by respondent's evidence, particularly that of Paul J. Bennett. On the question of whether respondent was compelled to make provision for the complainant in connection with its expansion plans, the tangible evidence as to what business the complainant would bring to the respondent's yard is not much. The record does not show any significant demand for the complainant's services as a commission man from producers or shippers.

We cannot say, then, that it was unreasonable or unlawfully discriminatory for the respondent, in the light of its former experience, to determine in its management discretion that its enlarged facilities should have one commission firm per alley in the cattle division. We cannot say, either, that it was unreasonable or unlawfully discriminatory for the respondent to decide that the building of another alley for the complainant would not warrant the necessary capital outlay without a better demonstration of compensatory revenue than the complainant could make. Because the respondent did offer to take in Missouri Farmers Association and refused the complainant does not, therefore, mean unlawful discrimination against the complainant. Mere registration as a market agency with the Secretary of Agriculture does not automatically force a stockyard company under any and all conditions to provide the registrant with facilities to do business. *Carnes v. St. Paul Union Stockyards Company*, 205 N. W. 630 (Minn. 1925), 221 N. W. 20 (Minn. 1929) ; *Tentative Findings of Fact, Conclusions and Order in The Livestock Marketing Association v. The St. Paul Union Stockyards Company*, B. A. I. Docket No. 728 (1937).

Of course, we do not have in the record any evidence with respect to the use of the existing facilities by the six firms in business. The evidence ends at the time of the hearing when only four of the proposed six alleys in the cattle division were in operation. Whether there might be facts which would change or modify our conclusion, we do not know.

In conclusion, while we get the impression from some things in the record that there is more to the case than meets the eye, the complainant nevertheless has not established violation of the act by the respondent.

#### ORDER

In view of the foregoing, the complaint is dismissed. Copies hereof shall be served on the parties by registered mail or in person.

(No. 2443)

*In re* CLARK O. KESINGER. P&S Doc. No. 1902. Decided May 26, 1950.**Cease and Desist—Violation of Act**

Inasmuch as respondent admitted the charges in the complaint and consented to the issuance of an order in this proceeding, respondent is directed to cease and desist from causing false entries to be made in the books kept for him by his clearing agency and from engaging in practices designed to deceive his clearing agency.\*

*Mr. John J. Murray* for complainant. *Mr. Clark O. Kesinger*, of National Stock Yards, Illinois, for respondent.

*Decision by Thomas J. Flavin, Judicial Officer*

**DECISION AND ORDER**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921 (7 U. S. C. 181 *et seq.*), instituted by an Order of Inquiry and Notice of Hearing dated April 14, 1950. It was charged in the complaint that the respondent wilfully caused false entries to be made in the books kept for him by his clearing agency in violation of section 402 of the act. It was also charged that the respondent violated section 312 (a) of the act by engaging in a practice designed to deceive his clearing agency.

On May 1, 1950, the respondent submitted a statement admitting the material allegations of fact and consenting to the issuance, without a hearing, of an order requiring him to cease and desist from the practices complained of in the Order of Inquiry and Notice of Hearing. The Livestock Branch, by its attorney, filed a recommendation on May 16, 1950, to the effect that an order be issued in accordance with the terms of the aforementioned statement of the respondent.

Inasmuch as the action has been recommended by the complainant and such action is provided for by section 202.5 (b) of the rules of practice (9 CFR 202), the order consented to shall be entered.

**ORDER**

The respondent shall cease and desist from causing false entries to be made in the books kept for him by his clearing agency and from engaging in practices designed to deceive his clearing agency.

Copies of this order shall be served upon the parties by registered mail or in person.

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

(No. 2444)

*In re* STEDELIN POULTRY & EGG COMPANY. P&S Doc. No. 1867. Decided May 29, 1950.

**Revocation of License—Financial Requirements—False Records**

Respondent's license revoked for violations of the act by failing to maintain the required financial conditions, failing to pay for poultry purchased, and for keeping false records.\*

*Mr. John J. Murray* for complainant. *Mr. Jack W. Bain*, Hearing Examiner.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921 (7 U. S. C. 181 *et seq.*), instituted by a complaint (styled "Order of Inquiry and Notice of Hearing") filed with the Hearing Clerk, Office of the Solicitor, on February 9, 1950. The respondent, Stedelin Poultry & Egg Company, a licensed poultry dealer of St. Louis, Missouri, was charged with having failed to maintain the required financial condition, having failed to pay for poultry purchased, and having kept false records. A copy of the complaint was served on respondent by registered mail on February 15, 1950, but no answer has been filed. The proceeding was assigned to Hearing Examiner Jack W. Bain on April 12, 1950.

Under section 202.9 of the applicable rules of practice (9 CFR Part 202), failure to answer the complaint constituted admission of the allegations and a waiver of oral hearing. Accordingly, without further investigation or hearing, the examiner issued his report on April 14, 1950, recommending revocation of respondent's license. A copy of the report was served upon respondent by registered mail on April 19, 1950, with a notification that respondent could file exceptions within 20 days. No exceptions have been filed.

**FINDINGS OF FACT**

1. Respondent is an individual, L. W. Stedelin, doing business as Stedelin Poultry & Egg Company at 823 North Fourth Street, St. Louis, Missouri. He is licensed under the act as a dealer in live poultry in St. Louis, a city designated as subject to the poultry provisions of the act, and at all times material herein he engaged as such dealer.

2. On January 11, 1950, respondent was notified in writing of the facts found herein and was accorded an opportunity to demonstrate compliance with the regulations.

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.



3. On July 13, 1949, respondent had a shortage of \$2,133.39 in the working capital of his poultry business and did not have a satisfactory surety bond or its equivalent.

4. On November 4, 1949, respondent had a shortage of \$2,419.82, and on January 18, 1950, a shortage of \$3,778.54, and did not have a satisfactory surety bond or its equivalent.

5. From November 4, 1949, through January 18, 1950, respondent's shortage in working capital was never less than \$2,419.82.

6. Between December 19, 1949, and January 15, 1950, respondent failed to pay a total of \$2,734.13 for live poultry purchased from six different sellers.

7. On January 18, 1950, respondent's records showed a total of \$1,300.06 accounts payable, but he had additional accounts payable which were not recorded.

### CONCLUSIONS

Sections 201.14 and 201.15 of the regulations under the act (9 CFR 201.14, 201.15) require that a licensee, to retain his license, must maintain free working capital equal to a fourth of his average weekly purchases or sales, or a surety bond or its equivalent. Respondent has continuously failed to meet this requirement.

Respondent's failure to pay for live poultry purchased is an unfair and deceptive practice in violation of section 202 of the act (7 U. S. C. 192).

In failing to record some of his accounts payable, respondent failed to keep records showing all transactions in his business, in violation of section 401 of the act (7 U. S. C. 221).

For these flagrant, continued, and repeated violations, respondent's license should be revoked, he should be ordered not to engage as a dealer in live poultry in St. Louis while not licensed, and the facts should be published, as authorized by section 505 of the act (7 U. S. C. 218d).

### ORDER

Respondent's license as a live poultry dealer in St. Louis, Missouri, is revoked.

Respondent shall cease and desist from engaging as a dealer in live poultry in St. Louis, in his own or any other name, unless and until he obtains another license under the act.

The facts and circumstances stated herein shall be published.

A copy hereof shall be served on respondent.

Except as to service, this order shall be effective on the 10th day after its date.

(No. 2445)

H. G. COOK v. ROBERT (BOB) NEEDHAM. PACA Doc. No. 5314. Decided May 2, 1950.

**Failure to Account and Remit Proceeds of Sale on Commission—Default**

Where, pursuant to the agreement of the parties, the respondent received and sold 157 bushels of sweet potatoes on a commission basis for complainant, but failed and refused to render complainant an accounting or to remit the proceeds of sale, and where respondent failed to file an answer to the formal complaint, held, respondent's failure to answer constitutes an admission of the facts alleged in the complaint and a waiver of hearing, and respondent's failure to account and pay to complainant the proceeds from the sale of the produce on commission constitutes a violation of the act for which reparation with interest should be awarded complainant.\*

**Damages—Reasonable Market Value of Commodity Less Amount of Commission**

Where respondent failed to remit proceeds of sale for 157 bushels of sweet potatoes delivered to respondent to be sold by him on a commission basis and the latter received and sold the sweet potatoes but failed to account or to remit the net proceeds of sale to complainant, held, complainant is entitled to recover damages amounting to the reasonable market value of the sweet potatoes delivered, less the amount of respondent's commission.\*

*Mr. H. G. Cook*, of Spartanburg, South Carolina, complainant *pro se*. *Mrs. Ilene M. Crigler*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C., 1946 ed., 499a *et seq.*). Complainant seeks to recover as reparation \$400 which, it is alleged, represents the net amount due in connection with the delivery by complainant to respondent for sale on commission of 157 bushels of sweet potatoes.

A copy of the report of investigation prepared by the Regulatory Division of the Fruit and Vegetable Branch was served upon complainant by registered mail on March 13, 1950. A copy of the formal complaint, together with a copy of the report of investigation, were also served by registered mail upon respondent on the same date. At the time of service of documents upon him, respondent was notified in writing that, in accordance with section 47.8 (c) of the rules of practice, an answer to the complaint should be filed by him within 20 days

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

after receipt of such notice, and that failure to file an answer would constitute an admission of the facts alleged in the complaint and would be deemed to be a waiver of hearing in the proceeding. Notwithstanding such notice, respondent failed to file an answer to the complaint. Accordingly, the case is disposed of on the basis of the formal complaint, including the exhibits attached thereto, and the report of investigation.

#### FINDINGS OF FACT

1. Complainant is an individual, H. G. Cook, whose post office address is 160 Kennedy Street, Spartanburg, South Carolina.

2. Respondent is an individual, Robert (Bob) Needham, whose last known post office address was 2365 North 22nd Street, Lafayette, Indiana. At the time of the transaction involved herein, respondent was licensed under the act.

3. On or about October 7, 1949, in the course of interstate commerce, the parties entered into an oral agreement for the delivery by complainant to respondent, and for the sale by respondent on a commission basis for complainant's account, of 130 bushels of No. 1 grade sweet potatoes and 27 bushels of No. 2 grade sweet potatoes. Respondent stated that the sweet potatoes would sell for a minimum price of \$3 per bushel for the No. 1 grade, and \$2 per bushel for the No. 2 grade. It was agreed that respondent should retain 10 percent of the sales price as his commission. On or about October 7, 1949, complainant shipped in his truck from loading point in the State of South Carolina to respondent in Benton Harbor, Michigan, the sweet potatoes which were the subject of the above contract.

4. Upon arrival of the aforesaid sweet potatoes at destination, they were received, accepted, and sold by respondent. Although requested to do so, respondent has failed and refused to render to complainant an accounting in connection with the delivery to him of the sweet potatoes, or to remit to complainant the amount due or any part thereof.

5. The market value of the No. 1 sweet potatoes on the date of delivery to respondent was at least \$3 per bushel, and the market value of the No. 2 sweet potatoes was at least \$2 per bushel, or a total minimum value of \$444.00.

6. The formal complaint was filed on March 7, 1950, which was within nine months after the cause of action alleged therein accrued.

#### CONCLUSIONS

As provided by the rules of practice, respondent's failure to file an answer to the formal complaint constitutes an admission of the allegations therein, and is a waiver of hearing in this proceeding (7 CFR 47.8 (c)).

Upon respondent's constructive admissions and other evidence of record, it is established that complainant delivered to respondent 157 bushels of sweet potatoes in accordance with the agreement of the parties. The evidence further shows that respondent accepted the sweet potatoes and resold them, but that respondent refused to render complainant an accounting in connection with the transaction, or to pay complainant the amount due or any part thereof.

There are no official market reports for sweet potatoes during the period October 7 to October 10, 1949, at Benton Harbor, Michigan. For the Detroit, Michigan, and Chicago, Illinois, markets, however, bushels of No. 1 grade sweet potatoes were quoted at \$3.40 to \$3.75, and No. 2 grade sweet potatoes were quoted at \$2.50 to \$3. At the time of entering into the oral agreement, respondent stated that the No. 1 and No. 2 sweet potatoes would sell for a minimum of \$3 and \$2 per bushel, respectively. We think that these latter amounts represent the reasonable market value of the sweet potatoes delivered. Complainant's damages amount to the reasonable market value of the sweet potatoes delivered (\$444.00), less respondent's commission of \$44.40, or \$399.60. *Henry F. Unrath v. Bronson and Bronson*, S. 1763; *James Sirks v. Bronson and Bronson*, S. 1736.

In conclusion, respondent's failure to render an accounting to complainant, and to pay complainant \$399.60 in connection with complainant's delivery to him of the sweet potatoes in question, constitutes a violation of section 2 of the act for which reparation should be awarded complainant, and the facts should be published.

### ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$399.60, plus interest thereon at the rate of 5 percent per annum from November 1, 1949, until paid.

The facts and circumstances set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2446)

DAVID M. SLAUGHTER & SON v. QUALITY TOMATO COMPANY. PACA  
Doc. No. 5256. Decided May 2, 1950.

### Dismissal—Settlement Between Parties

The Department having received a letter dated April 24, 1950, from complainant's authorized representative, to the effect that claim for reparation has been settled between the parties and that dismissal is requested, the complaint is accordingly dismissed.

*Southern Traffic Bureau*, of Harlingen, Texas, for complainant. *Mr. Warren S. Earhart*, of Kansas City, Missouri, for respondent. *Mr. Webster P. Mason*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Formal complaint was filed September 30, 1949, for the recovery of damages allegedly sustained as a result of respondent's unlawful rejection of a carload of tomatoes. Respondent filed an answer on January 3, 1950, and requested an oral hearing.

By letter dated April 24, 1950, complainant's authorized representative notified the Department that the parties had made an amicable settlement of the dispute and authorized dismissal of the complaint. Accordingly, the complaint filed herein is dismissed.

Copies hereof shall be served upon the parties.

(No. 2447)

**D. L. MEARS v. CARMEN D'AGOSTINO.** PACA Doc. No. 5315. Decided May 2, 1950.

### Failure to Pay—Default

Where complainant seeks to recover the balance of the purchase price for three truckloads of potatoes sold to respondent and also the cost of a telephone call made on behalf of respondent in connection with the sale, and where respondent failed to file an answer, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint, and his failure to pay is a violation of section 2 of the act for which complainant is entitled to an award of reparation in the amount due.\*

*Messrs. Mapp & Mapp*, of Keller, Virginia, for complainant. *Mr. Frederick W. Woodley*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Complainant filed an informal complaint on September 9, 1949. In the formal complaint filed March 1, 1950, complainant alleges that respondent failed to pay the full purchase price for three truckloads of potatoes purchased from complainant. An award of reparation in the amount of \$835.08 is requested.

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

A copy of the report of investigation made by the Fruit and Vegetable Branch was served upon complainant's attorneys on March 10, 1950. A copy of the formal complaint and a copy of the report of investigation were served upon respondent on March 12, 1950.

At the time of service of the formal complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint. Respondent has failed to file an answer and this proceeding is disposed of on the basis of the facts alleged in the formal complaint and the report of investigation.

#### FINDINGS OF FACT

1. Complainant is an individual, D. L. Mears, whose address is Keller, Virginia.

2. Respondent is an individual, Carmen D'Agostino, whose address is 326 Park Street, Syracuse, New York. At the time of the transaction involved herein, respondent was not licensed but was subject to license under the act. Subsequently, respondent obtained a license and paid arrearage to cover the period beginning May 1, 1949.

3. On July 6, 1949, at Keller, Virginia, complainant sold to respondent 725 100-pound sacks of potatoes which were graded and sacked in the presence of respondent or his agent. The agreed purchase price was \$2.35 per sack, or a total amount of \$1,703.75.

4. At complainant's request, a Federal inspection was made of the potatoes and they were certified as grade U. S. No. 1, Size A.

5. At the time of purchase, respondent paid complainant \$870 and gave complainant his check for \$835.08. The latter figure is comprised of \$833.75, the balance of the purchase price, and \$1.33, the cost of a telephone call made by complainant to respondent's bank in Syracuse, New York, for the purpose of ascertaining whether respondent had sufficient funds on deposit.

6. The potatoes were loaded onto trucks engaged by respondent and were transported, in interstate commerce, from Keller, Virginia, to respondent at Syracuse, New York.

7. Respondent stopped payment on his check for \$835.08. No part of this amount has been paid by respondent to complainant.

8. The informal complaint was filed within nine months after the cause of action accrued.

#### CONCLUSIONS

The failure of respondent to file an answer to the formal complaint constitutes an admission of the facts alleged therein, as provided in the rules of practice (7 CFR 47.8(c)).

The facts thus admitted are that respondent, after inspection, purchased from complainant 725 100-pound sacks of potatoes for the agreed purchase price of \$1,703.75; that in connection with the transaction and on behalf of respondent, complainant expended \$1.83 for a telephone call; that respondent received the potatoes and transported them in interstate commerce; and that respondent paid complainant \$870 but failed to pay \$835.08, the balance of the purchase price and the cost of the telephone call.

The failure of respondent to pay promptly the balance of the amount due complainant is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$835.08, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$835.08, with interest thereon at the rate of 5 percent per annum from August 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2448)

WISHNATZKI & NATHIEL *v.* LAKE ERIE FRUIT AND VEGETABLE COMPANY.  
PACA Doc. No. 5310. Decided May 2, 1950.

### Failure To Pay Balance of Purchase Price—Default

Where respondent failed to answer complaints alleging that respondent did not pay the full agreed price for two truckloads of mixed vegetables purchased from complainant, held, that such failure to file an answer constitutes an admission of the facts alleged in the complaints, and complainant is entitled to an award of reparation for the unpaid balance of the purchase price, plus interest.\*

*Wishnatzki & Nathiel*, of New York, New York, complainant *pro se.* *Mr. Webster P. Maxson*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*),

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

instituted to recover the balance of the purchase price of two truck shipments of mixed vegetables which moved from complainant's place of business at Plant City, Florida, to respondent in Cleveland, Ohio, in May and June, 1949. Informal complaint was received July 19, 1949. A formal complaint was filed on each of the two transactions on December 30, 1949.

A copy of the report of investigation made by the Department was served on complainant on February 1, 1950. On the following day, copies of the report of investigation and the formal complaints were served upon respondent.

At the time of service of the complaints, respondent was notified in writing that it had 20 days from the time it received the complaints in which to file a formal answer, and that, in accordance with section 47.8 (c) of the rules of practices, failure to file an answer would constitute an admission of the facts alleged in the complaints. Respondent has failed to file an answer, and this proceeding is disposed of on the basis of such default.

#### FINDINGS OF FACT

1. Complainant is a partnership composed of Harris Wishnatzki and Daniel Nathel, trading as Wishnatzki and Nathel, whose postoffice address is 313 Washington Street, New York 13, New York.

2. Respondent, Lake Erie Fruit and Vegetable Company, is a corporation whose postoffice address is Unit 41, Northern Ohio Food Terminal, Cleveland 15, Ohio. At the time of the transactions involved herein, respondent was licensed under the act.

3. On or about May 27, 1949, complainant, by oral contract, sold to the respondent a truckload of mixed vegetables at an agreed price of \$1,260.75, f. o. b. Plant City, Florida. Respondent negotiated this contract through its broker, Sam Hollander, who inspected the commodities at shipping point.

4. On the same day, complainant shipped from Plant City, Florida, the kind, quality, grade, and size of commodities called for in said contract of sale, and in the manner agreed upon.

5. Upon arrival of these commodities at Cleveland, Ohio, respondent accepted them in compliance with the oral contract, but has paid complainant only \$1,223.45, leaving a balance of \$37.30 still unpaid.

6. On or about June 3, 1949, complainant, by oral contract, sold to respondent a truckload of mixed vegetables at an agreed price of \$937, f. o. b. Plant City, Florida.

7. On the same day, complainant shipped from Plant City, Florida, the kind, quality, grade, and size of commodities called for in said contract of sale, and in the manner agreed upon.



8. Upon arrival of these commodities at Cleveland, Ohio, respondent accepted them in compliance with the oral contract, but has paid complainant only \$735.45, leaving a balance of \$183.55 still unpaid.

9. Informal complaint was filed within nine months after the cause of action accrued.

### CONCLUSIONS

The complaints on the two transactions involved herein were served upon the respondent on February 2, 1950. At that time respondent was notified in writing that it had 20 days, that is, until February 22, 1950, in which to file an answer. On March 1, 1950, a telegram was received from respondent which indicated that more time was desired in which to try to effect a settlement. This telegram requested a 10-day extension of time for filing a formal answer. Such extension was granted to March 11, 1950. On March 16, 1950, a letter was received from respondent to the effect that respondent was not liable for the amounts claimed since it had obtained authority by telephone, after each of the truckloads was received, to sell portions thereof for complainant's account. Since this letter did not meet the requirements of section 47.8 (b) of the rules of practice, it was not accepted as an answer. The respondent was immediately notified by mail that its letter received March 16, 1950, did not constitute an answer, and a further extension was granted until April 5, 1950, in which to file a formal answer. No answer has been filed.

Failure of respondent to file an answer to the formal complaints constitutes an admission of the facts alleged therein and a waiver of oral hearing, as provided in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that the complainant sold to respondent two truckloads of mixed vegetables for a total agreed price of \$2,197.75; that vegetables meeting contract requirements were shipped in interstate commerce to respondent and accepted by respondent; but that respondent has paid only \$1,976.90, thus leaving a balance due of \$220.85.

Respondent's failure to pay the agreed purchase price is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$220.85, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this order, respondent shall pay to complainant as reparation, \$220.85, with interest thereon at the rate of 5 percent per annum from July 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2449)

PACA Doc. No. 4872.\* Decided May 5, 1950.

**Dismissal—Settlement Between Parties**

The Department having received a letter dated April 11, 1950, from complainant's attorney, to the effect that the claim against respondent has been settled and requesting the matter to be closed, the complaint is accordingly dismissed.

*Mr. Ned Stein*, of Philadelphia, Pennsylvania, for complainant. *Messrs. Rankin, Oneal, Luckhardt, Center and Hall*, of San Jose, California, for respondent. *Mr. William L. Anderson*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**ORDER OF DISMISSAL**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*), for the recovery of a loss alleged to have been sustained as the result of respondent's failure to deliver a carload of "Pacific Fresh" frozen sweet unpitted cherries which would meet the requirements of a contract of sale previously entered into by the parties. Respondent filed an answer denying any liability to complainant in connection with this transaction.

The case was set for oral hearing at \* \* \*, on September 1, 1949. Complainant did not appear at the hearing but the Presiding Officer placed in the record for it the depositions of \* \* \*. Seven witnesses, for respondent testified at the hearing. Briefs were filed by both parties within the time provided after the hearing.

By letter dated April 11, 1950, complainant's attorney notified the Department that an agreement had been reached by the parties for settlement of the controversy and authorized closing the proceeding without taking any further action. Accordingly, the complaint is hereby dismissed.

Copies hereof shall be served upon the parties.

(No. 2450)

THE SCHUMAN COMPANY v. E. L. BARLOW. PACA Doc. No. 4959.  
Decided May 10, 1950.

**Unlawful Rejection of Commodity—F. O. B. Acceptance Final Sale—Damages**

Where complainant sought to recover reparation for loss sustained by complainant on resale of three carloads of celery purchased by respondent under an f. o. b. acceptance final contract, which shipments were rejected by respondent, held, that under the acceptance final contract, respondent

\*As explained in Prefatory Note, the identities of the parties are not disclosed.—Ed.

had no right of rejection; by rejecting respondent waived any right to claim damages for complainant's breach of the contract; and complainant is entitled to an award of reparation for the loss sustained by him on resale of the commodity.\*

**Contract of Purchase and Sale—F. O. B. Acceptance Final—Effect of Failure to Object to Confirmation of Sale—Evidence**

Failure of broker or buyer to make prompt objection to confirmation of sale containing the term "f. o. b. acceptance final" is regarded as evidence that this term was an agreed provision of the contract.\*

**Contracts—Meaning of Term "F. O. B. Acceptance Final"—Suitable Shipping Condition**

The term "f. o. b. acceptance final" in a contract of purchase and sale means that the buyer surrenders his right of rejection as well as the right to assert the defense of suitable shipping condition.\*

**Liability for Produce Purchased on Joint Account**

Purchase of produce on joint account renders the purchasers liable as partners to the seller who can hold either party liable for the full amount involved.\*

*Mr. R. W. Gudgeon*, of Chicago, Illinois, for complainant. *Mr. Ned Stein*, of Philadelphia, Pennsylvania, for respondent. *Mr. James A. O'Donnell*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a proceeding under the Perishable Agricultural Commodities Act, 1930 (7 U. S. C., 1946 ed., 499a *et seq.*), for the recovery of reparation in the amount of \$1,175.84, which is alleged to be the loss sustained by complainant on resale of three carloads of celery purchased by respondent under an f. o. b. acceptance final contract and thereafter rejected. Informal complaint was made to the Regulatory Division, Fruit and Vegetable Branch, on December 16, 1947, and a formal complaint was filed on January 21, 1948.

Respondent was served by registered mail with a copy of the formal complaint and a copy of the report of investigation on May 10, 1948. On the same day, a copy of the report of investigation was likewise served on complainant's attorney.

Respondent filed an answer on May 28, 1948, in which it is contended that the celery involved in this proceeding was not purchased under an f. o. b. acceptance final contract. Respondent alleged that the celery was purchased on a joint account basis by respondent and Monte Cross,

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

a broker, who represented that the celery was of good quality; was then in transit from loading point in California, and the price was stated as \$2 per crate f. o. b., plus topice. The rejection is claimed to have been warranted on the ground that these three carloads of celery failed to meet contract requirements on arrival at destination. It is also claimed that there was a withholding of material facts by complainant during negotiations. Accordingly, respondent denies any liability to complainant in connection with this transaction. By way of further answer, respondent incorporated as part of this proceeding his complaint filed against the broker, Monte Cross, in the reparation proceeding styled *E. L. Barlow v. Monte Cross*, PACA Docket No. 5005, and requested consideration of the hearings in both cases.

Copies of a notice dated June 6, 1949, consolidating the two hearings were served on all interested parties by registered mail. Thereafter, complainant's representative objected to consolidation on the ground, among others, that complainant had not been served with copies of the pleadings or related papers in the previously mentioned proceeding instituted by respondent against Monte Cross. Respondent's attorney thereafter notified the presiding officer that he had no objection to having the hearings conducted separately. Accordingly, the presiding officer notified the parties that a hearing in this proceeding would be held independently of the hearing in *Barlow v. Cross, supra*.

A hearing was held at Philadelphia, Pennsylvania, on August 22, 1949. R. W. Gudgeon appeared for complainant as its authorized representative. Respondent was represented by counsel. Complainant's case consisted of the deposition testimony of one of its salesmen, Morris S. Toledo, and the oral testimony of Harry E. Snyder, a representative of the Pennsylvania Railroad. Two witnesses, including the respondent, E. L. Barlow, appeared and testified for respondent.

#### FINDINGS OF FACT

1. Complainant, The Schuman Company, is a corporation whose post office address is 216 South Water Market, Chicago, Illinois.

2. Respondent is an individual, E. L. Barlow, whose post office address is Produce Building, Second and Dock Streets, Philadelphia, Pennsylvania. Respondent was licensed under the act at the time of the transaction involved herein.

3. On or about December 10, 1947, Morris S. Toledo, acting as salesman for complainant, engaged in a telephone conversation with Monte Cross, a broker of Scranton, Pennsylvania, acting for respondent. During this conversation Toledo and Cross entered into a contract, in the course of interstate commerce, for the sale by The Schuman Company to E. L. Barlow and to Monte Cross, as undisclosed joint venturer with respondent, of three carloads of celery then on track

at Kansas City, Kansas, more particularly described as follows: 448 crates of "Heavyweight" brand celery contained in car RD 35031; 448 crates of "Heavyweight" brand celery contained in car PFE 23471 and 448 crates of "John Law" brand celery contained in car PFE 94144. This agreement of purchase and sale was negotiated at the agreed price of \$2 per crate f. o. b. Guadalupe, California, acceptance final, plus a topice charge of \$55 per car, plus retopicing in transit.

4. In confirming the sale by wire to the broker on December 10, 1947, complainant advised that diversion was being made on the three carloads of celery which had been shipped from Guadalupe, California, on December 3 and 4, 1947.

5. On December 10, 1947, the broker, Monte Cross, mailed copies of each of three Standard Confirmations of Sale to complainant and to respondent. The confirmation on car RD 35031 contained, among others, the following terms of sale:

"Rolling car Yes, shpd 12/3 due on track KC

Sale Made (F. O. B. or Delivered) FOB Shpg. Pt. Acceptance"

These same terms of sale on the confirmations of cars PFE 23471 and PFE 94144 were identical and showed:

"Rolling Car Yes, shpd 12/4 en route KC

Sale Made (F. O. B. or Delivered) FOB Shpg. Pt. Acceptance"

6. Upon receipt of its copy of the broker's Standard Confirmation of Sale, complainant's sales Manager, John L. Senini, made immediate objection to the broker's use of the term FOB Shipping Point Acceptance rather than FOB Acceptance Final, as confirmed to the broker by complainant's wire of December 10, 1947.

7. The three carloads of celery involved in this proceeding were rejected upon arrival in Philadelphia on December 15, 1947, by respondent who complained at 8:45 a. m. the same day. At 9:10 a. m. on December 15, 1947, Cross sent complainant a telegram reading as follows:

"35031 23471 94144 PHILADELPHIA TODAY BARLOW REFUSING ACCEPTANCE ACCOUNT WILD GREEN APPEARANCE VERY LOW COMMERCIAL VALUE DUE TO BLIGHT DECAY YELLOWING ETC DONT LIKE ANY MIXED DEALS MORRIS SUGGEST EXPLAIN SITUATION SHIPPER GET BUYER SOME PROTECTION WILL ENDEAVOR SECURE ACCEPTANCE ADVISE."

At 2:47 p. m. the same day, Cross sent a second wire to complainant, reading as follows:

"JUST RECEIVED FOLLOWING WIRE BARLOW QUOTE FURTHER REFERENCE TELEPHONE CALL TO YOU 845AM TODAY ADVISING YOU OF ARRIVAL AT 550AM TODAY OF CELERY RD35031 PFE 94144 PFE 23471 AND SUBSEQUENT CALL WHEN YOU ADVISED ME YOU HAD IMMEDIATELY WIRED SHIPPER OF MY ACTION HAVE ORDERED INSPECTION

OF CARS TO BEAR OUT MY CONTENTION THESE CARS CONSIDERABLY OFF WHAT SOLD AS ALSO THESE CARS SOLD AS ROLLERS WHEN ACTUALLY TRACK KANSAS CITY AVAILABLE FOR INSPECTION HAVING HEARD NOTHING TO CONTRARY AM TURNING BACK TO SHIPPER HAVE SECURED JOINT INSPECTION NOTE 35031 NEEDS LITTLE ICE OTHER TWO TWO TO EIGHT INCHES TOPICE ON LOAD ADVISE IF WANT ICED PROTESTED 94144 DEFECTIVE EQUIPMENT ALL THREE PROTESTED DELAY DAMAGE DECAY UNQUOTE ADVISE YOUR DISPOSITION."

Complainant immediately replied by wire at 3:40 p. m. the same day:

"HAVE YOUR WIRES REFERENCE THREE CARS CELERY RD35031 PFE23471 PFE94144 ALSO JUST RECEIVED WIRE FROM PENNSYLVANIA RR AGENT ADVISING ALL THREE CARS REFUSED WE NOT ACCEPTING YOUR REFUSAL THESE CARS WERE SOLD TO YOU FOB ACCEPTANCE FINAL AND WERE CONFIRMED BY WIRE ON SAME BASIS STOP WE WIRED SHIPPER TO TRY SECURE SOME CONSIDERATION BUT BARLOW NOT JUSTIFIED IN REJECTING THESE CARS AS FAR AS CARS ROLLING OR KANSAS CITY GAVE YOU EXACT LOCATION AT TIME OF SALE SO DONT THINK YOU SHOULD USE ANY TECHNICALITIES ON THIS TRANSACTION WILL ADVISE AS SOON AS WE HEAR FROM SHIPPER."

8. Restricted Federal inspection of the celery contained in cars PFE 23471 and PFE 94144 which was made at Philadelphia, Pennsylvania, on December 15, 1947, the day of arrival at that destination, disclosed that the celery in each of these cars "Fails to grade U. S. No. 1 Green due to excessive grade defects," which were reported to range from 25 to 90 percent, and 25 percent to 70 percent, respectively, each "averaging approximately 45% including 25% pithy," remainder mechanical or worm damage. A similar inspection of the celery in car PFE 35031 which was also made promptly on arrival of this shipment at Philadelphia, Pennsylvania, on December 15, 1947, disclosed that this celery "Now fails to grade U. S. No. 1 Green, clipped to 16 inches, only on account of Late Blight," which was reported to average 4 percent "affecting 1 to 3 outer branches."

9. Immediately after it was known that respondent would not accept delivery of the shipments involved in this proceeding, complainant resold the celery through a Philadelphia dealer for net proceeds of \$1,677.16. This is \$1,175.84 less than the amount of \$2,853 for which the celery was sold to respondent. No part of loss sustained on resale has been paid by respondent.

10. Formal complaint was filed on January 21, 1948, which was within 9 months after the cause of action accrued.

### CONCLUSIONS

Complainant's version of the basis of sale is supported by its wired confirmation of December 10th to the broker and its three invoices of the same date to respondent. The term FOB Acceptance Final is set forth in these instruments. It is significant that neither the broker

nor respondent made prompt objection to such term. The broker explained his failure to object by stating in his letter to complainant dated December 15th "we probably overlooked the wording of your wire . . ." Respondent's explanation is that he did not see the invoices until he had concluded his inspection of the celery on December 15th. In this connection, however, respondent admitted on cross-examination that if the invoices were mailed from Chicago on Wednesday, December 10th, it was possible he received them on Friday, December 12th. The failure of the broker and the respondent to make prompt objection to the term FOB Acceptance Final, as contained in complainant's confirming telegram and invoices, is evidence that the term was an agreed provision of the contract. *Joseph Rothenberg v. H. Rothstein & Sons*, 6 A. D. 148; *L. Gillarde Company v. J. Hyman Distributing Company*, 7 A. D. 823, 828. As against the candid, direct testimony of complainant's deposition witness that the broker, Cross, agreed to the term FOB Acceptance Final, we have the hesitant, uncertain statement of respondent who testified he could not recall whether Cross mentioned either of the terms "Acceptance" or "Acceptance Final." In our opinion, the more reliable evidence of record supports complainant's contention that the celery was sold on an FOB Acceptance Final basis, and it is so concluded.

The term "f. o. b. acceptance final" means that the buyer surrenders his right of rejection as well as the right to assert the defense of suitable shipping condition. *The LeRoy Dyal Company v. Allen*, 161 F. 2d 152 (C. C. A. 4th, 1947), 6 A. D. 490. Rejection by the buyer under this form of contract constitutes a waiver of his right to claim relief for breach of contract by the seller. *L. Gillarde Company v. Joseph Martinelli & Co.*, 168 F. 2d 276 (C. C. A. 1st, 1948), 7 A. D. 421 and 595. Respondent rejected the three carloads of celery. Such rejection was without reasonable cause and in violation of section 2 of the act.

With respect to respondent's contention that the shipments were fraudulently represented to be rolling cars, and that the entire contract is voidable at respondent's option, it is noted that complainant's deposition witness specified that at the time of sale he definitely informed Cross of the shipping dates from California and that the cars were then at Kansas City. This testimony is supported by complainant's wired confirmation of December 10 wherein Cross was advised of the diversion of the cars to respondent at Philadelphia with shipping dates from California shown as December 3 for RD 35031 and December 4 for PFE 23471 and PFE 94144. This information is reflected in the broker's confirmation of sale sent to both complainant and respondent. The confirmation on car RD 35031 shows the shipping date as December 3 and the location of the car as "due on track KC." At the very

least, respondent was on notice of the possibility of this car being on track at Kansas City awaiting diversion. Aside from the notice given to respondent directly, he is chargeable with the notice given by complainant or complainant's salesman to Monte Cross who engaged in this transaction as an undisclosed joint venturer with respondent. We conclude that respondent has not shown by a preponderance of the evidence that the shipments in question were fraudulently represented by complainant to be rollers.

The only question remaining concerns respondent's liability to pay in full the amount of reparation sought by complainant. The record contains acknowledgments by both the broker, Monte Cross, and the respondent, E. L. Barlow, that they agreed to purchase the three cars of celery from complainant pursuant to a joint account venture. Such an arrangement is in the nature of a partnership and when established, as here, then complainant may hold either party liable for the full amount involved. *R. J. Head v. Leon Bros., Inc.*, S-1842, PACA Docket No. 2476; *Sidney Newman & Co., Inc. v. Gruber & Mintzer*, 8 A. D. 1294.

Complainant's damages amount to the loss sustained on resale of the three shipments, or \$1,175.84. Reparation should be awarded complainant against respondent in this amount. The facts should be published.

#### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$1,175.84, with interest thereon at 5 percent per annum from January 1, 1948, until paid.

The facts set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2451)

PACA Doc. No. 5005.\* Decided May 10, 1950.

#### Contribution—Agreement—Proceeding Held in Abeyance Pending Issuance of Further Order

Where it is found that the parties entered into a joint account agreement for the purchase and handling of three carloads of celery, and one of the partners was ordered by the Department to pay the seller an award of reparation arising in connection with the purchase, the copartner is liable for and should contribute half of whatever his partner paid pursuant to the reparation order notwithstanding the copartner was not made a party in the first proceeding and, in order to give the parties an opportunity to settle on this basis, the case is held in abeyance pending the issuance of a further order.\*\*

\*As explained in Prefatory Note, the identities of the parties are not disclosed.—Ed.

\*\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.



**Joint Venture—Partnership—Good Faith**

A joint venture is in the nature of a partnership, to which the rules of partnership ordinarily apply. A partner owes the utmost good faith to his copartner.\*\*

**Partnership—Liability of Partner—Good Faith**

A partner owes the utmost good faith to his copartner though in matters of judgment he will not be liable for a loss caused by honest mistake or error of judgment not amounting to wantonness or fraud.\*\*

**Partnership—Obligation of Partner—Joint Liability—Contribution from Copartner**

The obligation of partners on a partnership debt based on contract is joint and not joint and several; and where a partner pays more than his share to a judgment creditor he is entitled to contribution from his copartner.\*\*

**Notice to Partner Notice to All**

Notice to one partner is notice to all; and where reparation is awarded against a partner in one proceeding, the copartner may be held liable for contribution in a second proceeding.\*\*

**Partnership—Liability of Copartner for Contribution**

Where a partner is ordered to pay a reparation award in one proceeding, his copartner may be held liable for contribution in a second proceeding notwithstanding the copartner was not made a party to the first proceeding.\*\*

*Mr. Ned Stein*, of Philadelphia, Pennsylvania, for complainant. *Mr. Earl J. Gratz* and *Mr. David B. Fitzgerald*, of Philadelphia, Pennsylvania, for respondent. *Mr. James A. O'Donnell*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C., 1946 ed., 499a *et seq.*). No informal complaint was filed with the Department. Formal complaint was filed on May 28, 1948. On July 15, 1948, a copy of the formal complaint, together with a copy of the report of investigation prepared by the Regulatory Division, was served by registered mail upon respondent. On the same day a copy of the report of investigation was served by registered mail upon complainant.

It is alleged in the formal complaint that the parties agreed to purchase and handle on a joint account basis three carloads of celery

\*\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

which respondent represented to complainant as being of good quality, with slightly short edible shanks, rolling from California, at a price of \$2 f. o. b., plus top ice. It is further alleged that respondent fraudulently misrepresented the cars of celery in effecting the sale of same as a broker, since the celery was not of good quality and the cars were not rollers, having been stopped at \* \* \* for a period in excess of 24 hours prior to their alleged purchase.

In seeking an award of damages from respondent, complainant requested that the pleadings, report of investigation, and subsequent proceedings conducted in the reparation proceeding entitled *The Schuman Company v. E. L. Barlow*, PACA Docket No. 4959, be incorporated and made part of the record in this case. The complaint in the *Schuman* case involves the same three cars of celery in controversy here, and is a proceeding in which \* \* \*, as seller, seeks to recover damages from \* \* \*, as purchaser, based upon the latter's alleged wrongful rejection of the celery in question.

\* \* \* avers non-liability on his part in the *Schuman* proceeding; that either the respondent be held liable directly to \* \* \* for any amount found due in the companion case, or that respondent be liable to complainant in this proceeding in the amount of any award entered in favor of \* \* \* against him. In the alternative, \* \* \* avers that respondent is liable for at least one-half of any award recovered from \* \* \* by \* \* \*, by reason of the joint account arrangement entered into by the complainant and respondent herein.

Finally, complainant requested that this proceeding be tried and joined with the proceedings in the *Schuman* case.

Respondent filed an answer and counterclaim on September 28, 1948. In his answer, respondent denies generally the misrepresentation alleged in the complaint. Respondent admits that the celery was to be purchased and handled by the parties on a joint account basis. Respondent avers that in his discussions with the complainant, he explained that the celery could not be purchased "good quality" on arrival, that it must be bought acceptance at shipping point. Respondent also avers that since the celery was purchased for deferred speculation, complainant at no time prior to arrival of the celery at destination specifically stipulated that the cars had to be in motion at the time of purchase. Respondent's counterclaim consisted of a prayer for relief from any financial responsibility.

A hearing was held at Philadelphia, Pennsylvania, on August 22, 1949, immediately after the close of the hearing held in *Schuman v. Barlow*, *supra*. Both parties were represented by counsel. No witnesses testified for respondent. \* \* \*, complainant, and \* \* \*, District Freight Claim Agent for the Pennsylvania Railroad Company, appeared and testified for complainant. At the hearing, leave

was granted by the presiding officer for respondent's counsel to file an amended answer. Counsel for respondent also moved to dismiss the complaint for the following reasons:

1. The complaint does not aver sufficient facts to show a cause of action under the act.

2. The complaint does not aver that complainant has sustained any damage and does not aver any facts sufficient to show any legal damage or any damages cognizable under the act.

3. Complainant's attempt in paragraph 14 of the complaint to incorporate all of the proceedings in an entirely different action involving different parties and a different cause of action is contrary to law.

4. Complainant's allegations that he may sustain damage in another proceeding does not constitute damage sufficient to support any cause of action against respondent herein in this proceeding.

After hearing oral argument on the motion to dismiss, the presiding officer reserved decision and requested the filing of briefs. Thereafter, the presiding officer ruled that the motion was denied. Copies of the ruling were served upon both parties by registered mail.

#### FINDINGS OF FACT

1. Complainant is an individual, \* \* \*, whose post office address is \* \* \*.

2. Respondent is an individual, \* \* \* whose post office address is \* \* \*. Respondent was licensed under the act at the time of the transaction involved herein.

3. On or about December 10, 1947, complainant and respondent entered into an oral agreement for the handling, on a joint account basis, and in the course of interstate commerce, of three designated carloads of celery. The contract provided that purchases of the three shipments were to be made by \* \* \* from \* \* \*, and that they were to be made in the name of \* \* \*. It was further provided that the celery was to be purchased at a price of \$2 per crate, f. o. b. shipping point in California, plus topice charges; and was not on the basis of "good quality" on arrival but upon an "acceptance" basis and upon information furnished by \* \* \* to \* \* \*. The parties were to share equally any profits or losses resulting from such joint account undertaking.

4. Pursuant to the aforesaid joint account agreement \* \* \*, ostensibly acting as a broker for complainant, on or about December 10, 1947, negotiated a contract with \* \* \* for the sale by that company to \* \* \* of three shipments of "John Law" and "Heavy-weight" brands of celery, without specification of grade, at a price of \$2 per crate f. o. b. shipping point California, plus topice charges, contained in cars SFRD 35031, PFE 23471, and PFE 94144. At the time of this sale, the shipments were on track at \* \* \*.

5. Car SFRD 35031 arrived in \* \* \* at 5:30 p. m. December 8, 1947; car PFE 23471 arrived in \* \* \* at 1:15 p. m. December 9, 1947; and car PFE 94144 arrived in \* \* \* at 1:15 p. m. December 9, 1947.

6. \* \* \* sent to \* \* \* confirmations of sale dated December 10, 1947, on each of the three cars of celery in question. The confirmations indicate the celery was purchased on the basis of brand, without specification as to grade. With reference to the question shown on such confirmations whether each shipment was contained in a rolling car, the confirmation on SFRD 35031 reads, "Yes, shpd 12/3 due or track KC." The confirmation on PFE 23471 reads, "Yes, shpd 12/4 enroute KC," and the confirmation on car PFE 94144 reads the same. Complainant received copies of these confirmations of sale and did not object to them.

7. Upon arrival of the three shipments in question at \* \* \*, on December 15, 1947, each of the shipments was rejected by complainant. As a result of such rejection, \* \* \* obtained a reparation award against \* \* \* for \$1,175.84, as evidenced by order issued by this Department today in a proceeding entitled *The Schuman Company v. E. L. Barlow*, PACA Docket No. 4959.

8. Formal complaint was filed on May 28, 1948, which was within 9 months after the alleged cause of action accrued.

### CONCLUSIONS

It is undisputed that \* \* \* and \* \* \* entered into an agreement for the joint handling of the three carloads of celery in question, with profits or losses to be shared equally. Such agreement constitutes a joint adventure. *Lerner v. Sanderson*, 126 Cal. 481, 14 Pac. 2d 564 (1932), 138 A. L. R. 968, 980; *Fahey v. Ramsel*, 128 Kan. 502, 278 Pac. 715 (1929), 63 A. L. R. 909, 914. We have previously held that a joint venture is in the nature of a partnership, to which the rules of partnership ordinarily apply. *Sidney Newman & Co., Inc. v. Gruber & Mintzer*, 8 A. D. 1294, 1297.

Further undisputed evidence of record shows that respondent, ostensibly acting as a broker, negotiated the purchases of the three carloads of celery in question from \* \* \*, to complainant. Upon arrival of the cars at destination, they were rejected by complainant.

We first consider complainant's contention to the effect that \* \* \* is liable for the full amount of any loss occasioned by rejection of the shipments, upon the ground that \* \* \* made misrepresentations to \* \* \* upon the strength of which the latter was induced to enter into the purchase contracts in question. \* \* \* alleges that the celery to be handled under the joint account agreement was represented to him by \* \* \* as "good quality celery, with slightly short

edible shanks rolling from California;” whereas, the celery was not of good quality and the shipments purchased were not rollers but were tramp cars. The law is clear that a partner owes the utmost good faith to his copartner, whether the transaction be a joint venture or a partnership. *Nelson v. Abraham*, 29 Cal. 2d 745, 177 P. 2d 931 (1947); *Lipinski v. Lipinski*, 227 Minn. 511, 35 N. W. 2d 708 (1949).

In his sworn answer, \* \* \* states that, before entering into the joint account agreement, he explained to \* \* \* the celery had not been federally inspected at shipping point, and that reliance would have to be placed on brands. The sworn answer further states that “Continuing the discussion, \* \* \* asked if the cars could be purchased ‘good quality’ on arrival. I then explained we could not buy the cars in that manner, that they must be bought acceptance at shipping point.” The confirmations of sale, dated December 10, 1947, furnished by \* \* \* to \* \* \*, show that the celery was purchased on the basis of brands, without specification as to grade. With respect to whether the cars were rolling, the confirmation on car SFRD 35031, indicates “Yes, shpd. 12/3 due or track KC” and the confirmations on PFE 23471 and PFE 94144 indicate “Yes, shpd 12/4 enroute KC.” This information was accurate. The evidence shows car SFRD 35031 arrived in \* \* \* at 5:30 p. m. on December 8, 1947, and cars PFE 23471 and PFE 94144 arrived in \* \* \* at 1:15 p. m. December 9, 1947. Upon the information furnished him by \* \* \*, and having knowledge of the time schedule for shipments between \* \* \* and \* \* \*, complainant could have ascertained whether travel time on these shipments was normal. It is noteworthy that complainant at no time took exception to the confirmations of sale furnished him by \* \* \*. Furthermore, there is no showing that respondent had personal knowledge of any facts or circumstances which were not revealed to complainant. We find upon the evidence of record that complainant has failed to sustain the burden of proof upon him to show that he was induced by misrepresentation or fraud to enter into the sales contracts in question. He therefore may not shift liability to respondent under their joint account agreement on this ground.

One of respondent’s grounds of defense is the allegation that complainant, by the terms of the contract between it and \* \* \*, had no lawful right to reject the shipments and, therefore, complainant’s rejection, being unlawful, was a breach of the joint account agreement and releases respondent from any liability. The evidence before us in this particular case indicates that the purchases were made on an “acceptance” basis. Assuming for the purpose of discussion, but not deciding, that the basis of sale was “shipping point acceptance,” the purchaser ordinarily would have no lawful right of rejection. It

has been stated as a general rule that it is the duty of a partner to his copartner "to transact the business of the firm with reasonable care, skill, diligence and economy; and if the firm sustains injury by reason of his failure to do so, he must bear the losses, though in matters of judgment he will not be liable for a loss caused by honest mistake or error of judgment not amounting to wantonness or fraud." Mechem, *Elements of the Law of Partnership*, § 173. Although the purchaser under usual circumstances would have no right of rejection, under a shipping point acceptance contract, such action might be justified in cases of fraud in the inducement of the contract. Complainant herein has alleged such fraud—although, as discussed above, he has failed to prove his allegations. Nevertheless, the fact that \* \* \* rejected the shipments believing such fraud existed, would indicate that at the time of rejection there was a possibility that his action was legally justifiable. Under these circumstances, his actions cannot be held to be in wanton or flagrant disregard of his partnership obligations. Accordingly, we think respondent has failed to prove that complainant's rejection of the shipments was of such nature as to relieve respondent from liability under their joint account agreement.

Respondent's next defense is that complainant has failed to aver or prove legal damages. \* \* \* contends that the averment and proof of damages must be specific, and the necessary definiteness is lacking in this proceeding. \* \* \* further contends that, inasmuch as he was not served with the pleadings and the report of investigation in the proceeding brought by \* \* \* against \* \* \* he cannot be held liable for any damages awarded therein. We think that the presiding officer properly overruled respondent's motion to dismiss the complaint on this ground. We take official notice that an order was signed today in the reparation proceeding entitled *The Schuman Company v. E. L. Barlow*, PACA Docket No. 4959, in which damages of \$1,175.84 were awarded \* \* \* against complainant herein.

The evidence in this proceeding shows that the three shipments involved herein are the same three shipments involved in *Schuman v. Barlow*, *supra*. Also the evidence in this case shows the three shipments in question were being handled under a joint account agreement entered into by \* \* \* and \* \* \*. Notice to one partner operates as notice to the partnership, Section 12 of the *Uniform Partnership Act* (adopted in Pennsylvania); and notice to one partner is notice to all. *Stork Restaurant v. Sahati*, 166 F. 2d 348 (C. C. A. 9th 1948). It has been held that where a copartner was not individually served with summons and made a party in an action against the partnership, such copartner may, nevertheless, either before or after judgment, be brought into the proceeding in order that substantial justice

may be done. *State v. Braxton*, 230 N. C. 234, 52 S. E. 2d 892 (1949). We think respondent herein may not avoid liability by reason of the fact that he was not individually made a party in *Schuman v. Barlow*, *supra*. The obligation of partners or a partnership debt based on contract is joint, and not joint and several. *Gomez v. Vasquez*, 177 Misc. 874, 32 N. Y. Supp. 34 (1942). The evidence in this case shows respondent's joint liability for the damages awarded in PACA Docket No. 4959.

The joint account agreement between \* \* \* and \* \* \* provided that losses were to be shared equally. \* \* \* is liable for the payment of a loss of \$1,175.84, as evidenced by the reparation award issued in PACA Docket No. 4959. Where a partner pays more than his share to a judgment creditor, he is entitled to contribution from his copartner. *Goldring v. Chudacoff*, 15 Cal. App. 2d 741, 60 2d 135 (1936). From what has been said, we conclude that respondent owes complainant one-half of whatever amount complainant pays to \* \* \* pursuant to the order issued in the reparation proceeding just referred to. In order to give the parties an opportunity to settle their liabilities on the bases indicated, this proceeding should be held in abeyance for the time being. If respondent does not pay the amount indicated herein, such failure will be in violation of section 2 of the act.

#### ORDER

This proceeding is held in abeyance pending the issuance of a further order herein.

Copies hereof shall be served upon the parties.

(No. 2452)

AMERICAN FRUIT GROWERS, INC. v. BALTIMORE TOMATO COMPANY.  
PACA Doc. No. 5114. Decided May 11, 1950.

#### Rejection Without Reasonable Cause—Statute of Frauds—Damages

Where complainant seeks recovery of damages claimed to have resulted from respondent's rejection of four carloads of tomatoes, and respondent contends that no contract of sale was entered into and that the statute of frauds was not complied with, held, a contract of sale was negotiated between the parties by a broker and the memorandum issued by the broker satisfied the requirements of the statute of frauds, and, since the tomatoes were in accordance with the contract, the rejection was without reasonable cause and reparation should be awarded complainant for the difference between the purchase price and the net proceeds received from resale of the tomatoes.\*

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

*Mr. Harry S. Dunmire, of Pittsburgh, Pennsylvania, for complainant. Mr. Irving Coopersmith and Mr. H. R. Friedman, of New York, New York, for respondent. Mr. James A. O'Donnell, Presiding Officer.*

*Decision by Thomas J. Flavin, Judicial Officer*

#### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Informal complaint was received on June 16, 1948, and a formal complaint was filed on January 24, 1949. An amendment to the formal complaint was filed on February 24, 1949. Complainant alleges that it was damaged in the amount of \$4,598.70 as a result of respondent's unlawful rejection of four carloads of tomatoes. A copy of the formal complaint and a copy of the Department's report of investigation were served upon respondent by registered mail on March 10, 1949. Complainant's attorney was likewise served with a copy of the report of investigation on March 11, 1949. A copy of the Department's supplemental report of investigation was served upon complainant's attorney April 27, 1949, and upon respondent's attorney April 26, 1949.

In its answer, which was filed on April 18, 1949, respondent attempts to justify its refusal to accept delivery of the four carloads of tomatoes on the ground that no sale, or contract of sale, had been entered into by and between the parties. As a separate and distinct defense to the entire complaint, respondent pleads the Statute of Frauds.

A hearing was held at Baltimore, Maryland, on January 10, 1950. Both parties were represented by counsel. Three witnesses were called to testify for complainant. James Salvatore Spinale was the only witness to appear and testify for the respondent. Both parties filed briefs.

#### FINDINGS OF FACT

1. Complainant, American Fruit Growers, Inc., is a corporation with offices located at 1116-1117 Oliver Building, Pittsburgh, Pennsylvania.

2. Respondent, Baltimore Tomato Company, is a partnership composed of James Salvatore Spinale and Charles F. Spinale, whose address is 9 East Pratt Street, Baltimore, Maryland. At the time of the transaction complained of herein, respondent was licensed under the act.

3. On or about June 12, 1948, complainant sold to respondent four carloads of Stone Fort brand tomatoes, U. S. No. 1 grade, then in transit, at an agreed price of \$3.50 per lug for size 6x6 and larger and \$3 per lug for size 6x7, delivered Baltimore, Maryland. The car



numbers and the agreed delivered sales price less transportation and refrigeration charges were as follows: PFE 51750, \$2,256; PFE 42309, \$2,263.96; PFE 97157, \$1,738.93; and car PFE 75467, \$1,992.36. The contract was negotiated through Martin H. K. Paulsen, a broker, who acted as agent for both parties.

4. Car PFE 51750 was shipped from Garrison, Texas, on June 8, 1948, and arrived at Baltimore, Maryland, on June 16, 1948, it having been diverted while rolling on June 12, 1948, to complainant advise respondent. Upon arrival at destination, respondent refused to accept delivery of the tomatoes. Federal inspection of car PFE 51750 at shipping point on June 7 and 8 and at destination on June 16, 1948, disclosed the tomatoes contained therein as grading U. S. No. 1 on both occasions.

5. Following respondent's rejection of car PFE 51750, complainant realized net proceeds of \$1,386.12 upon resale of the tomatoes by Carlisle Miles & Company, Commission Merchants and Distributors, Baltimore, Maryland. Resale of the tomatoes was made promptly and at the best prices obtainable on the Baltimore market.

6. Car PFE 42309 was shipped from Timpson, Texas, on June 8, 1948, and arrived at Baltimore, Maryland, on June 16, 1948, it having been diverted while rolling on June 12, 1948, to complainant advise respondent. Upon arrival at destination, respondent refused to accept delivery of the tomatoes. Federal inspection of car PFE 42309 at shipping point on June 8 and at destination on June 16, 1948, disclosed the tomatoes contained therein as grading U. S. No. 1 on both occasions.

7. Following respondent's rejection of car PFE 42309, complainant realized net proceeds of \$1,005.90 upon resale of the tomatoes by Carlisle Miles & Company, Commission Merchants and Distributors, Baltimore, Maryland. Resale of the tomatoes was made promptly and at the best prices obtainable on the Baltimore market.

8. Car PFE 97157 was shipped from Timpson, Texas, on June 9, 1948, and arrived at Baltimore, Maryland, on June 17, 1948, it having been diverted while rolling on June 12, 1948, to complainant advise respondent. Upon arrival at destination, respondent refused to accept delivery of the tomatoes. Federal inspection of car PFE 97157 at shipping point on June 9 and at destination on June 17, 1948, disclosed the tomatoes contained therein as grading U. S. No. 1 on both occasions.

9. Following respondent's rejection of car PFE 97157, complainant realized net proceeds of \$592.87 upon resale of the tomatoes by Carlisle Miles & Company, Commission Merchants and Distributors, Baltimore, Maryland. Resale of the tomatoes was made promptly and at the best prices obtainable on the Baltimore market.

10. Car PFE 75467 was shipped from San Augustine, Texas, on June 7, 1948, and arrived at Baltimore, Maryland, on June 17, 1948, it having been diverted while rolling on June 12, 1948, to complainant advise respondent. Upon arrival at destination, respondent refused to accept delivery of the tomatoes. Federal inspection of car PFE 75467 at shipping point on June 7 and at destination on June 18, 1948, disclosed the tomatoes contained therein as grading U. S. No. 1 on both occasions.

11. Following respondent's rejection of car PFE 75467, complainant realized net proceeds of \$667.66 upon resale of the tomatoes by the John P. Nolan Co., Commission Merchants and Distributors, Baltimore, Maryland. Resale of the tomatoes was made promptly and at the best prices obtainable on the Baltimore market.

12. There is now due and owing to complainant from respondent the sum of \$4,598.70, the difference between the delivered sales prices and the net proceeds realized on resale, no part of which has been paid.

13. Formal complaint was filed January 24, 1949, which was within nine months after the cause of action accrued.

### CONCLUSIONS

Respondent contends that no valid contract of purchase and sale was negotiated by the parties since its offer to purchase the tomatoes at certain stated prices was not accepted by the complainant. It is complainant's position that prices, as well as all other terms, were agreed to, thereby resulting in a contract binding on both parties. We believe the record supports complainant's position.

It is undisputed that respondent's James Salvatore Spinale spoke to Martin H. K. Paulsen, the broker, about 8:00 a. m. on June 12, 1948, at which time Spinale requested Paulsen to look into the possibility of obtaining several cars of tomatoes for respondent. Paulsen testified that Spinale expressed interest in tomatoes priced at \$3.50 per lug for size 6x6 and \$3 per lug for size 6x7, delivered Baltimore. Spinale testified that no prices were mentioned at this time. The record would seem to indicate that prices were discussed for at 9:50 a. m. on June 12th Paulsen sent the following wire to complainant at Jacksonville, Texas:

"dunk (can you) sell several eatex (East Texas) Stonefort usone uptmv (6x6 and larger) 3.50 upufu (6x7) 3.00 delivered corki (wire complete manifest)" (parenthetical translation added).

Spinale said he next talked to Paulsen for about five minutes over the telephone between 10 and 10:30 a. m. on June 12. According to Spinale, Paulsen advised that although the shipper was asking \$3.75 per lug for size 6x6 and larger, and \$3.25 per lug for size 6x7, he believed he could get the tomatoes for about \$3.60, size 6x6 and

larger, and \$3.10, size 6x7. Spinale testified he informed Paulsen he would be interested in three or four cars provided they could be bought for \$3.25, size 6x6 and larger, and \$2.75, size 6x7, delivered Baltimore. It was Paulsen's testimony that he telephoned Spinale about 11:30 a. m. on June 12 and that Spinale remained on the phone for about twenty minutes during which time Paulsen was in teletype communication with complainant concerning the terms of sale. Paulsen's testimony is accepted as to the time and length of his telephone call to Spinale.

The teletype message between complainant and Paulsen establishes to our satisfaction that Spinale named prices of \$3.50 per lug for 6x6's and better, and \$3 per lug for 6x7's, to Paulsen who in turn conveyed this information to complainant. Throughout the teletype message, Paulsen continually advised complainant of what Spinale was saying over the telephone. Among other things, Paulsen notified complainant he had a representative of respondent on the phone, and that this representative stated \$3.50 delivered was respondent's best offer. Complainant was urging Paulsen to try and obtain an additional ten cents. Spinale was insisting his limit would be \$3.50 and on such basis he would take three or four cars. Again, in discussing availability of size 6x7 tomatoes, complainant advised that four nice cars would be picked, some with 6x7's, at prices of \$3.60 and \$3.10 per lug delivered. To this Paulsen relayed to complainant Spinale's reply: "Says sorry but his limit 3.50."

Later in the message and after complainant had given the manifest on the four cars in controversy, Paulsen quoted Spinale as being satisfied provided the prices would be \$3.50 and \$3 per lug delivered, the tomatoes to grade U. S. No. 1 on arrival. Complainant thereupon confirmed the sale at these prices and notified Paulsen that although the cars would be diverted at once drafting would be delayed a few hours in the hope that Paulsen would be able to get \$3.60 and \$3.10 per lug. Finally, Paulsen quoted Spinale's approval of the railroad routing and the shipping of the cars with initial ice and vents open. The teletype message ended with complainant asking Paulsen to send a wire if he could obtain the additional ten cents per lug. At 12:05 p. m. on June 12, which was within a few minutes of the conclusion of the teletype message, Paulsen wired complainant as follows: "Retwx sorry unable increase price baltimore tomato company cars."

Spinale's testimony that he was unaware of the fact that Paulsen was in teletype communication with complainant is unconvincing. The whole tenor of the teletype message is such as would warrant the conclusion that Paulsen, acting as agent for both parties, nego-

tiated a contract by the terms of which the parties agreed on prices, brand, sizes, diversion, railroad routing and icing instructions.

The record shows that copies of Paulsen's memoranda of sale were mailed to the parties no later than 12:30 p. m. on Saturday, June 12, 1948, and that respondent received its copies in the morning mail on Monday, June 14. There is no dispute that the parties talked on the telephone about 6:00 p. m. on June 12. Spinale insisted he would pay no more than a delivered price of \$3.25 and \$2.75 per lug. Paulsen pointed out that Spinale had set the price himself; that complainant wanted more than respondent was willing to pay; and that complainant finally came down to and accepted the price offered by respondent.

On Sunday, June 13th, Paulsen sent complainant a night letter advising that respondent wanted to cancel the order. At 8:28 a. m. on June 13, respondent wired Paulsen its best offer would be \$3.25 and \$2.75 per lug delivered otherwise the deal was off. Paulsen received this wire on June 14. Again, on June 15, respondent wired Paulsen: "Sorry declining offer of four cars tomatoes mentioned." Paulsen sent a day letter to complainant on June 15 quoting the contents of the two wires he had received from respondent. At 3 p. m. on June 17 Paulsen sent respondent a day letter advising that unless the drafts were paid immediately the four cars of tomatoes would be sold for respondent's account.

It is concluded that during the forenoon of June 12 the parties contracted for the purchase and sale of the four cars of tomatoes, of U. S. No. 1 grade, at agreed delivered prices of \$3.50 per lug for size 6x6 and larger, and \$3 per lug for size 6x7, and that the tomatoes did in fact grade U. S. No. 1 on arrival. The sole remaining question is whether the agreement entered into by the parties satisfied the Maryland Statute of Frauds, which respondent raised as a defense. Section 22 of Article 83 of Flack's Annotated Code of Maryland provides in part that:

"A contract to sell or a sale of any goods or choses in action of the value of fifty dollars or upwards shall not be enforceable by action, unless the buyer shall accept part of the goods or choses in action so contracted to be sold, or sold and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

"(2) \* \* \*.

"(3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods."

Respondent contends that Paulsen had no express authority to sign the standard memoranda of sales as the buyer's agents and that no such

authority will be implied and cites *Franklin Sugar Refining Co. v. Kane Milling*, 278 Pa. 105, 122 Atl. 231, (1923). There is nothing in the record to show express authority given the broker to sign memoranda of sales. However, the circumstances indicate the broker was agent for both parties and it has been held that, in such event, when an oral agreement has been made, the broker has implied authority to sign a memorandum of the transaction so as to make the agreement enforceable. *Straesser-Arnold Co. v. Franklin Sugar Refining Co.*, 8 F (2d) 601, (C. C. A. 7th, 1925) certiorari denied, 270 U. S. 642 (1926); *Miller-Crenshaw Co. v. Colorado Mill & Elevator Co.*, 87 F (2d) 457, (C. C. A. 8th, 1937); *F & W Grand Five, Ten, Twenty Five Cent Store v. Eiseman*, 127 S. E. 872 (1925); and *Austin Nichols & Co. v. Lingo*, 136 Md. 183, 110 Atl. 509, (1920).

Respondent also contends that before the broker could sign the memoranda so as to bind the respondent, such memoranda must be received and accepted by respondent. It is not disputed that respondent returned the memoranda of sales to the broker immediately upon receipt of same on June 14, 1948. A similar situation prevailed in the case of *George F. Wilke and Company v. Sam Bailin*, 6 A. D. 814, 820, and it was there stated:

"The broker, in conveying the terms of respondent's offer to complainant and negotiating the sale, was acting on respondent's behalf and the memorandum of sale issued by the broker, which respondent refused to accept, is merely evidence for consideration in determining the terms and the conditions of the previously concluded agreement, *Associated Fruit Distributors of California v. Lord and Spencer Company*, 6 A. D. 40, and executed for the purpose of making the agreement enforceable under the statute of frauds. *Anonymous*, 6 A. D. 47."

In concluding that the memoranda of sales did not have to be accepted by the respondent, we desire to point out that the Maryland Statute of Frauds does not require a memorandum of sale made by an agent to be delivered to his principal.

It is concluded that respondent's rejection of the four cars of tomatoes was without reasonable cause and in violation of section 2 of the act. Reparation should be awarded complainant against respondent in the amount of \$4,598.70, and the facts should be published.

#### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$4,598.70, with interest thereon at the rate of 5 per cent per annum from July 1, 1948, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2453)

M. S. TOLEDO CO. v. VALENTINO PRIZZI. PACA Doc. No. 5323. Decided May 15, 1950.

**Failure to Pay Purchase Price—Default**

Where complainant alleged failure of respondent to pay the agreed purchase price for a carload of grapes sold and delivered to respondent, and where respondent failed to file an answer to the complaint, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, and respondent's failure to pay the agreed purchase price is in violation of section 2 of the act, for which complainant is entitled to an award of reparation in the amount of the purchase price, with interest.\*

*M. S. Toledo Co.*, of Los Angeles, California, complainant *pro se*. *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Informal complaint was received November 21, 1949. Formal complaint was filed March 14, 1950, alleging that complainant sold to respondent 910 lidded lugs of Holy Toledo brand California Zinfandel grapes on or about September 20, 1949, for a total purchase price plus precooling of \$1,452.27, and that respondent failed to pay the contract price.

An investigation was made by the Department and a copy of its report was served upon complainant March 25, 1950. Copies of the formal complaint and the report of investigation were served on the respondent March 23, 1950.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint and a waiver of oral hearing. Respondent has failed to file an answer and this proceeding is disposed of on the basis of the formal complaint and the report of investigation.

**FINDINGS OF FACT**

1. Complainant, M. S. Toledo, is an individual, trading as M. S. Toledo Company, whose address is 606 South Hill Street, Los Angeles, California.

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

2. Respondent, Valentino Prizzi, is an individual, whose address is 27 Market Street, Pittston, Pennsylvania. At the time of the transaction complained of herein, respondent was not licensed under the act but was subject to license. In December, 1949, respondent paid license fee arrearage to cover the period when this transaction occurred.

3. On or about September 20, 1949, complainant sold to respondent 910 lidded lugs of Holy Toledo brand California Zinfandel grapes at \$95 per ton, f. o. b. shipping point, plus \$25 precooling charge.

4. On or about September 21, 1949, the price was adjusted to \$88 per ton, f. o. b. shipping point plus \$25 precooling charge, or a total contract price of \$1,452.27.

5. On or about September 13, 1949, grapes of the kind, quality and size called for in the contract were shipped in car PFE 3281 from Mira Loma, California. The car, while moving in interstate commerce, was diverted to respondent in Pittston, Pennsylvania.

6. Upon arrival of the shipment at destination, respondent accepted the grapes but has not paid to complainant the adjusted contract price of \$1,452.27, or any part thereof.

7. Formal complaint was filed within nine months after the cause of action accrued.

### CONCLUSIONS

Failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing as provided for in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that complainant contracted to sell to respondent 910 lidded lugs of Holy Toledo brand California Zinfandel grapes for an agreed purchase price of \$1,427.27, plus a \$25 precooling charge, or a total contract price of \$1,452.27; that grapes meeting contract requirements were shipped in interstate commerce and accepted by respondent; but that respondent has not paid the contract price or any part thereof.

Respondent's failure to pay the agreed contract purchase price is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$1,452.27, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$1,452.27, with interest thereon at the rate of 5 per cent per annum from October 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2454)

LADD PACKING CO. v. COONE FRUIT STAND. PACA Doc. No. 5325.  
Decided May 16, 1950.

### Failure To Pay Purchase Price—Default

Where it is alleged in the complaint that respondent failed to pay complainant the agreed purchase price of a truckload of oranges and grapefruit sold to respondent, and where respondent did not file an answer, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint and a waiver or oral hearing, and respondent's failure to pay the purchase price is a violation of section 2 of the act, for which reparation should be awarded complainant.\*

*Ladd Packing Company*, of San Mateo, Florida, complainant *pro se*. *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*), instituted to recover the purchase price of a truckload of oranges and grapefruit allegedly sold to respondent on March 31, 1949, and shipped in interstate commerce from complainant's place of business at San Mateo, Florida, on that date. Informal complaint was received August 9, 1949. A formal complaint was filed October 31, 1949.

Copies of the formal complaint and the report of investigation made by the Department were served on respondent March 16, 1950. On the following day, complainant received a copy of the report of investigation by registered mail.

At the time of service of the complaint, respondent was notified in writing that it had 20 days from the time it received the complaint in which to file a formal answer, and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint. Respondent has failed to file an answer, and this proceeding is disposed of on the basis of such default.

### FINDINGS OF FACT

1. Complainant is an individual, Thomas E. Ladd, doing business as Ladd Packing Company whose post office address is San Mateo, Florida.

2. Respondent is an individual, J. Clifford Coone, doing business as Coone Fruit Stand whose post office address is 49 Quogue Road,

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.



Riverhead, Long Island, New York. At the time of the transaction involved herein, respondent was licensed under the act.

3. On March 31, 1949, complainant sold to respondent one truckload of oranges and grapefruit, stamped No. 2 grade. The load consisted of 248 boxes of oranges at an agreed price of \$2.85 per box or \$706.80, and 64 boxes of grapefruit at \$1.85 per box or \$118.40, total price \$825.20, f. o. b. respondent's truck at San Mateo, Florida, payable upon arrival at destination, Riverhead, Long Island, New York.

4. The truckload of fruit was officially inspected at shipping point on the day of the sale. The oranges (stamped U. S. No. 2) actually graded U. S. No. 1. The grapefruit (stamped U. S. No. 2) was of U. S. No. 2 grade. The certificate of inspection shows that no decay was found, and that grade defects were within tolerance.

5. Upon arrival of said truck shipment of fruit at destination, respondent accepted the commodities in compliance with the contract of sale, but has failed, neglected, and refused to pay complainant the agreed purchase price thereof.

6. Informal complaint was filed within nine months after the cause of action accrued.

#### CONCLUSIONS

The complaint was served on respondent on March 16, 1950. Respondent was given 20 days from that date in which to file an answer. Subsequently, the period for filing an answer was extended to April 20, 1950. No answer was filed.

Failure of respondent to file an answer to the formal complaint constitutes an admission of the facts alleged therein and a waiver of oral hearing, as provided in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that complainant sold to respondent one truckload of oranges and grapefruit, consisting of 248 boxes of oranges at \$2.85 per box, and 64 boxes of grapefruit at \$1.85 per box, or a total agreed price of \$825.20; that oranges and grapefruit meeting contract requirements were delivered to and accepted by respondent; but that respondent has failed to pay any part of the agreed purchase price.

Respondent's failure to pay the agreed price is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$825.20, with interest, and the facts should be published.

#### ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$825.20, with interest thereon at the rate of 5 percent per annum from April 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2455)

PACA Doc. No. 5211.\* Decided May 16, 1950.

**Dismissal—Settlement Between Parties**

Where complainant's attorney notified the Department that the dispute had been settled and compromised, and authorized dismissal of the complaint, the complaint is accordingly dismissed.

*Mr. Robert C. Goad*, of Lovington, Virginia, for complainant. *Mr. Arthur Slavin*, of New York, New York, for respondent. *Mr. James A. O'Donnell*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**ORDER OF DISMISSAL**

This is a reparation proceeding under the Perishable Agriculture Commodities Act, 1930, as amended (7 U. S. C. 1946 ed., 499a *et seq.*). In a formal complaint filed June 2, 1949, complainant asked for an award of reparation covering damages sustained as a result of respondent's alleged rejection without reasonable cause of a shipment of apples purchased from complainant in January 1948. Respondent filed an answer on November 10, 1949, and requested an oral hearing.

The case was set for oral hearing at New York City on May 19, 1950. By letter dated May 3, 1950, complainant's attorney notified the Department that the matter had been settled and compromised, and the respondent given a full release. Complainant's attorney authorized dismissal of the complaint. Accordingly, the complaint filed herein is dismissed.

Copies hereof shall be served upon the parties.

(No. 2456)

C. H. ROBINSON COMPANY v. O. T. WILCOX. PACA Doc. No. 5332.  
Decided May 18, 1950.

**Failure to Pay Brokerage Fee—Default**

Where complainant, as broker, sold potatoes for respondent who paid complainant part of the agreed brokerage but failed to pay the balance due, held, that respondent's failure to file an answer to the complaint constitutes an admission of the facts alleged therein, and respondent's failure to pay the balance of the brokerage is a violation of section 2 of the act for which complainant is entitled to an award of reparation.\*

*Messrs. Seward R. Moore and Neil A. Riley*, of Minneapolis, Minnesota, for complainant is entitled to an award of reparation.\*\*

*Decision by Thomas J. Flavin, Judicial Officer*

\*As explained in Prefatory Note, the identities of the parties are not disclosed.—Ed.

\*\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). A formal complaint was filed May 6, 1948, alleging that complainant negotiated contracts for the sale by respondent of 12 carloads of potatoes and that respondent failed to pay complainant \$267.50, the balance of the agreed brokerage.

A copy of the report of investigation made by the Fruit and Vegetable Branch of the Department was served upon complainant on May 2, 1949. A copy of the report of investigation and a copy of the formal complaint were served upon respondent on May 5, 1949.

At the time of service of the formal complaint, respondent was notified in writing that he would have 20 days thereafter within which to file an answer and that, in accordance with section 47.8 (c) of the rules of practice, the failure to file an answer would constitute an admission of the facts alleged in the formal complaint. Respondent has failed to file an answer and this proceeding is being disposed of on the basis of such default.

### FINDINGS OF FACT

1. Complainant is a corporation, C. H. Robinson Company, whose address is 430 Oak Grove Street, Minneapolis, Minnesota.

2. Respondent is an individual, O. T. Wilcox, whose address is Greenville, Michigan. At the time of the transaction involved herein, respondent was licensed under the act.

3. During November 1947, in the course of interstate commerce, respondent employed complainant to negotiate contracts for the sale of 12 carloads of potatoes. Respondent agreed to pay complainant brokerage totaling \$285. Contracts of sale were negotiated by complainant in accordance with the instructions given by respondent.

4. Respondent has paid complainant \$117.50 of the total agreed brokerage and is now indebted to complainant for the balance of \$167.50.

5. The formal complaint was filed within nine months after the cause of action accrued.

### CONCLUSIONS

The failure of respondent to file an answer to the formal complaint constitutes an admission of the facts alleged therein as provided in the rules of practice (7 CFR 47.8 (c)). The facts thus admitted are that complainant negotiated contracts for the sale of potatoes by respondent; that respondent agreed to pay complainant brokerage of

\$285; and that respondent paid complainant \$17.50, but failed and refused to pay the balance of \$267.50.

The report of investigation shows that subsequent to the filing of the formal complaint respondent made payments to complainant totaling \$100. Therefore, the amount now due complainant is \$167.50.

The failure of respondent to pay complainant for brokerage services is in violation of section 2 of the act. Reparation should be awarded complainant in the amount of \$167.50, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$167.50, with interest thereon at the rate of 5 percent per annum from December 1, 1947, until paid.

The facts and circumstances set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2457)

PACA Doc. No. 5201.\* Decided May 18, 1950.

### Dismissal—Withdrawal of Complaint

Complaint for reparation dismissed upon request of complainant.

Complainant *pro se*. Respondent *pro se*. Mr. Frederick W. Woodley, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### ORDER OF DISMISSAL

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). A formal complaint was filed on September 26, 1949, for the recovery of the purchase price of a quantity of citrus fruit alleged to have been sold to respondent. An answer was filed by respondent on October 28, 1949.

Before completion of the submission of evidence under the shortened procedure (section 47.20 of the rules of practice), complainant requested the Department, by letter dated May 10, 1950, to dismiss the complaint. Accordingly, the complaint filed herein is dismissed.

Copies hereof shall be served upon the parties.

\*As explained in Prefatory Note, the identities of the parties are not disclosed.—Ed.

(No. 2458)

INLAND EMPIRE FROZEN FOODS CO. v. FLINT FROZEN FOOD, INC. PACA  
Doc. No. 5062. Decided May 23, 1950.

**Failure to Pay Balance of Purchase Price**

Where complainant sold and delivered to respondent 1200 50-pound cartons of frozen fancy peas, respondent failed to make payment of the purchase price, and the parties entered into a settlement agreement for an allowance to respondent and for the release of portions of the shipment upon installment payments by respondent, and respondent failed to make payment of the balance due under the settlement agreement, held, respondent's failure to pay constitutes a violation of the act, for which reparation, with interest, should be awarded complainant.\*

*Mr. Max Tirschweli*, of New York, New York, for complainant. *Mr. Jacob M. Zinaman*, of New York, New York, for respondent. *Mr. James A. O'Donnell*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C., 1946 ed., 499a *et seq.*). Complainant alleges that on or about July 29, 1947, it sold to respondent 1,200 50-pound cartons of frozen peas at an agreed price of 14½ cents per pound, f. o. b. shipping point, Freewater, Oregon, a sight draft to be attached to the bill of lading for shipment at once. Complainant also alleges that peas which met contract specifications were shipped to respondent at Asbury Park, New Jersey, on August 1, 1947, and that following respondent's refusal to pay the draft as agreed, the peas were stored in the Monmouth Cold Storage at Asbury Park, where they still remain except for such portions as were released to respondent by complainant. It is further alleged that the matter was settled on or about May 21, 1948, at which time respondent turned over to complainant's attorney a series of checks on which complainant received only \$3,302.50, leaving a balance due from respondent of \$4,950, for which complainant seeks reparation.

Respondent filed an answer in which the allegations of the complaint were denied except those referring to the arrival and storage of the peas, a mutually agreed upon allowance, and the payment of \$3,302.50 to complainant, all of which were admitted. By way of separate defense respondent alleged that complainant delivered 60,000 pounds of Frozen Fancy Peas, which were not in accordance with a sales memorandum calling for delivery of 45,000 pounds of Grade A Frozen

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

Thomas Laxton Peas in 50-pound containers, 1947 pack, at 14½ cents per pound.

On November 26, 1948, the parties were served by registered mail with copies of the report of investigation made by representatives of the Fruit and Vegetable Branch. On the same day a copy of the complaint was served by registered mail upon respondent. A hearing was held in New York City on December 9, 1949, and January 3 and 13, 1950. The hearing on December 9, 1949, was continued to January 3, 1950, upon agreement of counsel for both parties who indicated the possibility of the matter being settled. The hearing on January 3 was continued to January 13, 1950, at the request of complainant's counsel who stated for the record that complainant had agreed to accept the sum of \$3,250 in full settlement of the matter, with respondent's certified check in this amount to be mailed to complainant's attorney on January 5, 1950. At the hearing on January 13 complainant was represented by counsel. No one appeared for respondent. No witnesses testified at the hearing, the record consisting of a statement by complainant's counsel and the Department's report of investigation. Complainant's attorney stated that the total amount received on the agreed purchase price from respondent was \$3,300, leaving a balance due complainant in the sum of \$4,952.50.

A few minutes prior to the hearing on January 13, 1950, the presiding officer received a long distance call from Sanford C. Flint, respondent's president, who advised that the peas were in the course of being sold to a soup manufacturer and that payment therefor would be received in a few days at which time respondent would pay complainant's attorney the agreed amount of the settlement. The presiding officer informed Mr. Flint that there could be no further delay in disposing of the hearing phase of the proceeding and that in the event the parties actually negotiated a settlement an appropriate order would be entered in due course.

#### FINDINGS OF FACT

1. Complainant, Inland Empire Frozen Foods Co., is a corporation whose post office address is Pendleton, Oregon.

2. Respondent is a corporation, Flint Frozen Food, Inc., trading as Monmouth Products Co., whose post office address is 1010 Corlies Street, Asbury Park, New Jersey. Respondent was not licensed under the act at the time of the transaction involved herein, but was subject to license. Prior to the date of the transaction respondent had applied for a license and subsequently was issued a license.

3. On or about July 29, 1947, the parties entered into an agreement, in the course of interstate commerce, for the sale by complainant to respondent of 1,200 50-pound cartons of Frozen Fancy Peas, straight

pack, 1947 crop, at an agreed price of 14½ cents per pound, or a total price of \$8,700, f. o. b. shipping point, Freewater, Oregon, sight draft to accompany bill of lading for shipment at once. It was agreed that shipping point Federal inspection certificates, showing the peas to be Fancy grade, would be final and binding on both parties. The contract of sale was negotiated by James F. Wilson Company, 226 National Building, Seattle 4, Washington, and Lewis-Martin Corporation, 110 East 42nd Street, New York 17, New York, who acted as agents for both complainant and respondent. Sales Memorandum No. 2744 covering the sale was executed by the Lewis-Martin Corporation on July 25, 1947. The sale was confirmed by the James F. Wilson Company on July 29, 1947.

4. On or about August 5, 1947, in car PFE 100488, complainant shipped from Freewater, Oregon, to respondent at Asbury Park, New Jersey, the quantity, kind, quality, grade, and size of peas called for by the contract between the parties. Complainant's sight draft, invoice, bill of lading, and shipping point inspection certificates were forwarded to the Asbury Park National Bank, Asbury Park, New Jersey.

5. Upon arrival of car PFE 100488 at destination on or about August 18, 1947, respondent failed to pay complainant's draft and requested 10-days time. Thereafter, at respondent's request the peas were stored in complainant's name in respondent's cold storage, Monmouth Cold Storage Company, 1010 Corlies Avenue, Asbury Park, New Jersey.

6. In order to avoid litigation and for the purpose of obtaining payment of the draft, complainant granted respondent an allowance of \$797.50 against the agreed purchase price of \$8,700.

7. On May 19, 1948, the parties agreed to settle the matter on the following basis: Respondent turned over to complainant's attorney a series of checks totalling \$7,902.50, the first of which checks was dated May 19, 1948. The remaining checks, each in the sum of \$1,000, were payable 10 days apart with the final check for \$902.50 being dated July 29, 1948. Respondent also made available a check for \$350 representing the approximate amount of interest. The parties also agreed that respondent would make immediate payment of freight and warehouse charges; that title to the peas would remain in complainant until the full amount due was paid by respondent; and that complainant would release to respondent 150 cases of peas with each payment of \$1,000.

8. In accordance with the settlement agreement entered into by the parties on May 19, 1948, complainant's attorney presented respondent's checks for payment and received partial payment of \$3,300.

9. There remains due and owing from respondent to complainant the difference between the agreed purchase price (\$8,700) plus interest (\$350), less the allowance made by complainant (\$797.50), or \$8,252.50, and the amount paid to complainant by respondent (\$3,300), or a total of \$4,952.50, no part of which has been paid.

10. Informal complaint was filed on October 5, 1947, which was within 9 months after the alleged cause of action accrued.

### CONCLUSIONS

Respondent did not appear, nor was it represented at the hearing held on January 13, 1950. Respondent is therefore deemed to have waived the right to an oral hearing in the proceeding. Section 47.15 (d) (2) of the rules of practice, 7 CFR 47.15 (d) (2).

Complainant contends that the transaction was covered by Lewis-Martin Corporation Sales Memorandum No. 2744. On the other hand, respondent alleged in its answer and by way of separate defense that Sales Memorandum No. 2743, as modified and superseded by Sales Memorandum No. 2747, controls. To be acceptable, such allegation necessarily would have to be supported by a preponderance of competent and reliable evidence. This respondent failed to present, since no evidence whatever was presented by respondent at the oral hearing.

In the absence of sworn testimony being offered by either side at the hearing, it becomes necessary to consider the Department's report of investigation which is the only evidence of record in this proceeding. This report, consisting of 28 exhibits, discloses the following information:

A valid contract of purchase and sale, as detailed in paragraph 3 of the findings, was negotiated by the parties' brokers. At the time the car of peas arrived at Asbury Park, New Jersey, on or about August 18, 1947, respondent, being unable to pay the agreed purchase price, requested a period of 10 days within which to pick up the sight draft and suggested that complainant authorize the freight agent at Asbury Park to unload the car and place the commodity in the Monmouth Cold Storage warehouse, respondent to pay all freight charges. Complainant agreed to respondent's request and issued instructions for the release of the bill of lading to the freight agent. Thereafter respondent failed to pay the draft, as agreed. Following numerous requests made of respondent, without avail, to pay the purchase price, complainant filed an informal complaint with the Department on October 5, 1947.

In response to requests for information by the Department, respondent advised that Federal inspection had been requested and that if such inspection showed the peas to be of Grade A quality the draft would be paid. Inspection of 953 cartons of peas, the total



amount then remaining in storage, was made on October 29, 1947. Of the 12 samples inspected, 11 were found to be U. S. Grade A or U. S. Fancy, the remaining sample was found to be U. S. Grade D or Sub-standard because of varietal mixture. This one sample resulted in the entire lot being shown as failing to meet U. S. Grade A or U. S. Fancy.

On November 12, 1947, the broker, James F. Wilson Company, addressed a letter to the Department calling attention to the fact that inspection covered a total of only 953 cartons of peas which would indicate respondent had withdrawn 247 cartons without authority from complainant. The broker also pointed out that the inspector was unable to locate any cartons bearing two of complainant's code numbers which were covered by the shipping point inspection certificates; that two other code numbers were found by the inspector, neither of which was listed in the original inspections nor had they been assigned by complainant; and that the inspector was unable to identify the lot number with the warehouse receipt; all of which indicated evidence of mishandling.

On January 13, 1948, a representative of the Fruit and Vegetable Branch conducted an investigation in the matter at respondent's place of business and ascertained the following facts: Respondent's president, Sanford C. Flint, admitted that Sales Memorandum 2744 stated the contract correctly. Flint also admitted that upon arrival of the shipment at Asbury Park he informed the broker, Lewis-Martin Corporation, he was unable to pay for the peas, promising that if arrangements could be made for placing the peas in the Monmouth Cold Storage he would pay the draft in 10 days. Flint admitted that in September 1947 he had again promised his broker to pay the draft. Investigation disclosed that as of January 13, 1948, only 780 cartons of the peas remained in storage. Flint claimed an additional 406-carton lot was part of complainant's shipment but investigation showed this particular lot to be the property of persons other than complainant. M. Lowenthal of the Lewis-Martin Corporation informed the Branch representative he had a definite understanding with Flint that shipping point Government inspection certificates showing the peas to be of the required Fancy grade were to be final and binding on both parties.

A letter was sent to respondent by the Department under date of April 9, 1948, reading in part as follows:

"We are in receipt of letter from complainant dated April 3, 1948, advising that during the Atlantic City convention, an adjustment of 5¢ per pound was mutually agreed upon in connection with 319 cases of peas found to be offgrade. The complainant states that you first promised to pay its invoice at New York, but later telephoned and stated that money expected from an insurance adjustment had not been received and asked that the draft be reentered, assuring that

it would be paid within five days. According to complainant's statements, the draft is as yet unpaid."

Respondent's reply, dated April 12, 1948, was in part:

"We had anticipated that this matter would be settled six weeks ago but due to a very large number of fires the fire insurance company adjustment bureau has been so far behind in the work that they have not been able to get the loss adjusted. As soon as we receive the payment of this insurance, settlement will be made immediately with the Inland Empire Frozen Food Company of Pendleton, Oregon."

In addition to the foregoing, which represents the facts as developed in the report of investigation, the hearing record contains in full the contents of a letter addressed to respondent by complainant's attorney under date of May 21, 1948. This letter confirmed in detail the arrangements made by the parties to settle the controversy and its material provisions are set forth in paragraph 7 of the findings. Complainant received from respondent only a part payment of the total amount due under the terms of this settlement.

The record establishes clearly and convincingly that respondent has violated section 2 of the act by failing and refusing to make full payment promptly to complainant for the peas involved in this controversy. Respondent submitted not one iota of evidence to support the allegations of its separate defense. On the contrary, the record is replete with admissions by respondent of its indebtedness to complainant and reveals oft-repeated broken promises made by respondent over a period of almost 2½ years to pay various sums in settlement. As recently as December 9, 1949, respondent requested and was granted an adjournment of the hearing scheduled for that date in order that the parties might work out some adjustment of the matter. Thereafter, at the adjourned hearing held on January 3, 1950, the record shows complainant agreed to accept the sum of \$3,250 in full settlement of the entire matter, with respondent's certified check in that amount to be mailed from Asbury Park on January 5 so as to arrive in New York City on the following day. In the circumstances, the hearing was again continued to January 13, 1950, at which time neither respondent nor its attorney appeared. However, the presiding officer received a telephone call from Mr. Flint a few minutes before the hearing was called to order. Mr. Flint stated that the peas were being sold to a soup manufacturer and that as soon as payment was received he would communicate with complainant's counsel and make settlement. To date, no such payment has been made to complainant.

It is concluded that respondent's failure to pay to complainant the balance due on the purchase price of the peas constitutes a violation of section 2 of the act. The balance due is \$4,952.50, as stated in Finding of Fact No. 9. The pleadings indicate respondent paid \$3,302.50.

The record was later corrected to show that payments totaling \$3,300 were made by respondent. Complainant should be awarded reparation in the amount of \$4,952.50, with interest, and the facts should be published.

#### ORDER

Within 30 days from the date of this decision, respondent shall pay complainant, as reparation, \$4,952.50, with interest thereon at 5 per cent per annum from June 1, 1948, until paid.

The facts as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2459)

ROSENTHAL COMPANY, INC. *v.* ILLINOIS WHOLESALE PRODUCE COMPANY. PACA Doc. No. 5333. Decided May 23, 1950.

#### Failure to Pay Purchase Price—Default

Where complaint alleged failure of respondent to pay the agreed purchase price for two carloads of watermelons sold to and accepted by respondent, and where respondent failed to file an answer, held, that respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint, and respondent's failure to pay the agreed purchase price is in violation of section 2 of the act for which reparation, with interest, should be awarded complainant.\*

*Messrs. Foley & Foley*, of Chicago, Illinois, for complainant. *Mr. Webster P. Maxson*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

#### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*), instituted to recover the purchase price of two carloads of watermelons sold by complainant to respondent in June and July, 1948. Informal complaint was received by the Chicago, Illinois, office of the Regulatory Division on February 2, 1949. A formal complaint was filed December 13, 1949.

A copy of the report of investigation made by the Department was served on complainant's attorney on March 27, 1950. The copies of the formal complaint and report of investigation sent by registered mail to respondent on March 22, 1950, were returned with the notation, "left notice," on the envelope. In accordance with section 47.4 of the rules of practice, these copies were remailed to the last known

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

address of respondent by regular mail on April 6, 1950. Such service is attested to in the file on this case by the certificate of the person who mailed said copies by regular mail.

At the time of service of the complaint respondent was notified in writing that it had 20 days from the time it received the complaint in which to file a formal answer, and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint. Respondent has failed to file an answer, and this proceeding is disposed of on the basis of such default.

#### FINDINGS OF FACT

1. Complainant, Rosenthal Company, Inc., is a corporation whose post office address is 1425 South Racine Avenue, Chicago, Illinois.

2. Respondent, Illinois Wholesale Produce Company, is a partnership composed of Ted Miller and Tony DiGiovanni whose post office address is 1226 South Church Street, Rockford, Illinois. At the time of the transactions involved herein respondent was licensed under the act.

3. On or about June 16, 1948, in the course of interstate commerce, complainant sold to respondent one carload of watermelons loaded in car TP 22140, at an agreed price of \$170.50 and on the following terms: "Inspected and accepted track Chicago final." Respondent inspected the shipment in the car at Chicago.

4. On or about July 27, 1948, in the course of interstate commerce, complainant sold to respondent one carload of watermelons loaded in car MP 52481 at an agreed price of \$260.53 and on the following terms: "Inspected and accepted track Chicago final."

5. Both cars were shipped from loading points in the State of Texas to Chicago, and were there sold to respondent and diverted to Rockford, Illinois.

6. Upon arrival of these commodities at Rockford, Illinois, respondent accepted both shipments in compliance with the contracts of sale, but has refused or neglected to pay complainant any part of the purchase price thereof.

7. Informal complaint was filed within nine months after the causes of action accrued.

#### CONCLUSIONS

Failure of respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint as provided in the rules of practice (7 CFR 47.8 (c)).

The facts presented in the case are that complainant sold to respondent two carloads of watermelons loaded in cars TP 22140 and MP 52481 for a total agreed price of \$431.03, "Inspected and accepted

track Chicago final"; that both cars were delivered to and accepted by respondent in compliance with the contract of sale, but that respondent has refused or neglected to pay the purchase price, or any part thereof.

Respondent's failure to pay the agreed price is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$431.03, with interest, and the facts should be published.

#### ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$431.03, with interest thereon at the rate of 5 percent per annum from August 1, 1948, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2460)

TONASKET ELLIS-FORDE GROWERS AND PESHAISTIN FRUIT GROWERS  
ASSOCIATION *v.* EDMONSON BROKERAGE COMPANY. PACA Doc.  
No. 5312. Decided May 23, 1950.

#### Failure to Pay Balance of Losses on Resale—Assignment—Default—Damages

Where respondent contracted with complainant's assignor for the purchase of two carloads of apples but subsequently refused to accept delivery of either shipment and agreed to reimburse the shippers for any losses sustained on resale of the apples but has paid only a part of these losses, and has failed to answer the complaint, it is held, that failure to answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, and failure to pay is in violation of the act, and complainants' assignee should be awarded reparation in the amount of the unpaid balance of the losses sustained on resale of the produce.\*

*Gwin, White & Prince, Inc.*, of Seattle, Washington, for complainants. *Mr. John T. Pearson*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

#### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*), instituted for the recovery of the loss alleged to have been sustained on resale of two carloads of apples after rejection by respondent. Formal complaint was filed on April 12, 1948. A copy of this complaint together with a copy of the report of investigation made by

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

the Department was served on respondent on January 20, 1950. On January 23, 1950, a copy of the report of investigation was served on complainants' agent and assignee.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute a waiver of hearing and an admission of the facts as alleged in the complaint. Respondent has failed to file an answer and this proceeding is being disposed of on the basis of such default.

#### FINDINGS OF FACT

1. Complaint, Tonasket Ellis-Forde Growers, is a corporation whose address is Tonasket, Washington. Complainant, Peshastin Fruit Growers Association, is a corporation whose address is Peshastin, Washington.

2. Respondent is an individual, Robert Lawrence Edmonson, trading as Edmonson Brokerage Company, whose address is 802-806 South Sixth Street, Columbus, Mississippi. At the time of the transaction complained of herein respondent was licensed under the act.

3. On October 11, 1947, respondent contracted to purchase from Tonasket Ellis-Forde Growers one carload of 798 boxes of "C" grade Delicious apples at the f. o. b. price of \$1.70 per box, or \$1,356.60 for the carload, which had been shipped on October 8, 1947, by the Tonasket Ellis-Forde Growers in car FDEX 9100 from Tonasket, Washington. On the same day the shipment was diverted to Columbus, Mississippi, "advise" Edmonson Brokerage Company.

4. On October 11, 1947, respondent contracted to purchase from Peshastin Fruit Growers Association one carload of 798 boxes of Combination Extra Fancy and Fancy Delicious apples at the f. o. b. price of \$2.80 per box, or \$2,245.40 for the carload, to be shipped from Peshastin, Washington, the following week. Apples meeting the requirements of this contract were shipped on October 13, 1947, in car ART 21595, to Columbus, Mississippi, "advise" Edmonson Brokerage Company.

5. On October 22, 1947, and before either of the shipments had reached Columbus, Mississippi, respondent sent a telegram to complainants' agent, Gwin, White & Prince, Inc., and thereafter called by telephone requesting release from the purchase of the apples and diversion elsewhere of both of the shipments. Cancellation of the contracts was refused, but Gwin, White & Prince, Inc., as agent for complainants, offered to resell the apples for respondent's account, which offer was accepted by respondent.

6. On October 23, 1947, the apples contained in car ART 21595 shipped by the Peshastin Fruit Growers Association were sold to the Arnold Fruit Company of Jacksonville, Florida, at an f. o. b. price of \$1,995, or at a loss to the shipper of \$239.40 on this carload. On the following day the apples shipped by the Tonasket Ellis-Forde Growers in car FDEX 9100 were sold to James G. Coleman of Columbia, South Carolina, at an f. o. b. price of \$1,197, or at a loss to the shipper of \$159.60. The loss thus sustained on resale of these two carloads of apples amounted to \$399 of which the respondent has paid \$199.50, leaving an unpaid balance of \$199.50.

7. On February 21, 1949, complainants assigned to Gwin, White & Prince, Inc., Seattle, Washington, all their claims against respondent in connection with the two shipments here involved.

8. Formal complaint was filed in this proceeding on April 12, 1948, which was within nine months after the cause of action accrued.

### CONCLUSIONS

The failure of respondent to file an answer in this proceeding constitutes an admission of the facts alleged in the complaint, as provided in the rules of practice (7 CFR 47.8 (c)). Furthermore, respondent has admitted, in letters written to the Department, that he owes the full amount claimed and he has made two payments in connection with these transactions. The record discloses that after respondent agreed to a resale of the shipments in controversy the apples were resold for the best prices obtainable, but these sales were for an amount \$399 less than the contract price to respondent. After the complaint was filed in this proceeding, the claims were assigned to Gwin, White & Prince, Inc., of Seattle, Washington. Respondent subsequently paid \$199.50 to the assignee, thus reducing the claim to \$199.50. Respondent's failure to pay the full amount due under the contract for resale of the apples is in violation of section 2 of the act. Reparation should be awarded complainants' assignee, Gwin, White & Prince, Inc., in the sum of \$199.50, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this decision, respondent shall pay to Gwin, White & Prince, Inc., assignee of complainants, as reparation, \$199.50, with interest thereon at the rate of 5 percent per annum from November 1, 1947, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2461)

PACA Doc. No. 5328.\* Decided May 24, 1950.

**Dismissal—Settlement between Parties**

Where the Department has been notified that the parties entered into a settlement agreement which provides for a dismissal of the complaint, the complaint is accordingly dismissed.

Complainant *pro se*. Mr. Joseph C. Patis, of Chicago, Illinois, for respondent.  
Mrs. Ilene M. Crigler, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**DISMISSAL ORDER**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C., 1946 ed., 499a *et seq.*). Complaint was filed for damages alleged to have been sustained as a result of respondent's refusal to accept and pay for a quantity of blueberries. Respondent filed an answer denying liability and requesting an oral hearing.

By letter dated May 16, 1950, counsel for respondent transmitted to the Department a Mutual Release, signed by both parties, stating the terms of a settlement agreement reached by the parties. In the same instrument the parties agreed that the complaint filed in this proceeding should be dismissed. Accordingly, the complaint herein is dismissed.

(No. 2462)

MAT ROBINSON v. GEORGE C. ESTES, t/a Estes Market. PACA Doc. No. 5336. Decided May 26, 1950.

**Failure to Pay Balance of Purchase Price—Default**

Where respondent failed to pay the balance of the agreed purchase price of one carload and one truckload of watermelons and failed to file an answer, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint, and his failure to pay the balance of the agreed purchase price is a violation of section 2 of the act for which reparation, with interest, should be awarded complainant.\*\*

Mr. Wallace E. Sturgis, of Ocala, Florida, for complainant. Mr. Webster P. Mason, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

\*As explained in Prefatory Note, the identities of the parties are not disclosed.—Ed.

\*\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.



### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C., 1946 ed., 499a *et seq.*), instituted to recover the balance of the purchase price of one carload and one truckload of watermelons allegedly sold by complainant to respondent on May 18, 1948, and delivered to respondent in compliance with the contract of sale. Informal complaint was received by the Department on July 13, 1948. Formal complaint was filed January 12, 1950.

A copy of the formal complaint was served on respondent by registered mail on March 30, 1950. On the same date, both parties received copies of the report of investigation made by the Fruit and Vegetable Branch.

At the time of service of the complaint, respondent was notified in writing that he had 20 days from the time he received the complaint in which to file a formal answer, and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint. Respondent has failed to file an answer, and this proceeding is disposed of on the basis of such default.

### FINDINGS OF FACT

1. Complainant is an individual, Mat Robinson, whose post office address is Weirsdale, Florida.

2. Respondent is an individual, George C. Estes, doing business as Estes Market, whose address is East 4th Street and Ashland Road, Mansfield, Ohio. At the time of the transaction involved herein respondent was licensed under the act.

3. On or about May 18, 1948, complainant, by oral contract, sold to respondent one carload and one truckload of watermelons. The melons were inspected by respondent at Weirsdale. The total agreed price for the carload and the truckload was \$800 f. o. b. Weirsdale, Florida. However, because of an error in computing the price, respondent paid and complainant accepted only \$680 in travellers' checks as the full purchase price, at the time of the sale.

4. Shortly after respondent departed with the truckload of watermelons from complainant's place of business at Weirsdale, Florida, complainant detected the error, and in his own truck overtook respondent's truck on the highway. There the parties agreed that an error had been made in computing the purchase price, and that, in addition to the \$680 already paid, a balance of \$120 was still due. Respondent gave to complainant his personal check for that amount as

payment in full for the entire purchase, and proceeded with the truckload of watermelons to his place of business at Mansfield, Ohio.

5. The carload of melons purchased at the same time was subsequently delivered to and accepted by respondent at Mansfield, Ohio, in accordance with the terms of the oral contract.

6. Respondent's personal check for \$120 was dishonored upon presentation in due course for the reason that respondent, after returning to Mansfield, Ohio, had stopped payment thereon. Respondent has since failed, neglected, or refused to pay this amount, which he agreed was the balance due.

7. Informal complaint was filed within 9 months after the cause of action accrued.

### CONCLUSIONS

The complaint in this proceeding was served upon respondent on March 30, 1950, and he was given 20 days from that date in which to file an answer. Subsequently, at the request of respondent's attorney, the period for filing an answer was extended to May 1, 1950. No answer has been filed.

Failure of respondent to file an answer to the formal complaint constitutes an admission of the facts alleged therein, as provided in the rules of practice (7 CFR 47.8 (c)).

The facts presented in the case are that respondent, by oral contract, purchased from complainant one carload and one truckload of watermelons at an agreed price of \$800, f. o. b. Weirsdale, Florida; that the size and quality of the melons were selected and approved by respondent, in person, while the melons were being loaded; that the sum of \$680 was paid in travellers' checks to complainant at the time of the sale, which amount was thought to be the full purchase price, through an error in computation; that both the carload and the truckload of watermelons were delivered to respondent in compliance with the contract; that after respondent had departed from Weirsdale, Florida, with the truckload, complainant overtook him on the highway and pointed out the error in their computation of the purchase price; that the parties then agreed that \$800 should have been paid as the full purchase price, and respondent gave complainant his personal check for the balance due of \$120, but subsequently stopped payment on the check, and has since refused to pay the \$120 balance or any part thereof.

Respondent's failure to pay the balance of the agreed price is a violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$120 plus interest, and the facts should be published.

**ORDER**

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$120, with interest thereon at the rate of 5 percent per annum from June 1, 1948, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2463)

**MAURICE A. GOBLER v. MYER COHN, INC.** PACA Doc. No. 5340. Decided May 26, 1950.

**Failure to Pay Purchase Price—Default**

Where complainant alleged failure of respondent to pay the agreed purchase price for 75 crates of Honeydew melons sold and delivered to respondent, and where respondent failed to file an answer to the formal complaint, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint, and his failure to pay the agreed purchase price is in violation of section 2 of the act, for which complainant should be awarded reparation in the amount of the purchase price, with interest.\*

*Mr. Maurice A. Gobler*, of Philadelphia, Pennsylvania, complainant *pro se*. *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Formal complaint was filed March 8, 1950, alleging that complainant sold to respondent 75 crates of Honeydew melons for an agreed purchase price of \$290, and that respondent failed to pay the contract price. An investigation was made by the Department and a copy of its report was served upon the complainant on March 27, 1950. On the same date, copies of the formal complaint and the report of investigation were served on the respondent.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

in the complaint. Respondent has failed to file an answer and this proceeding is disposed of on the basis of the formal complaint and the report of investigation.

#### FINDINGS OF FACT

1. Complainant, Maurice A. Gobler, is an individual whose address is 307 Fruit Trade Building, Dock and Granite Streets, Philadelphia, Pennsylvania.

2. Respondent, Myer Cohn, Inc., is a corporation whose address is P. O. Box 52, Albany, New York. At the time of the transaction complained of herein, respondent was licensed under the act.

3. On or about October 19, 1949, complainant sold to respondent 75 crates of Honeydew melons for the agreed purchase price of \$290.

4. Honeydew melons of the kind, quality, quantity, and grade called for in the contract were shipped in interstate commerce to the respondent in Albany, New York.

5. Upon arrival of the shipment at destination, respondent accepted the Honeydew melons but has not paid to complainant the contract price of \$290 or any part thereof.

6. Formal complaint was filed within nine months after the cause of action accrued.

#### CONCLUSIONS

Failure of respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint as provided for in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that the complainant contracted to sell to respondent 75 crates of Honeydew melons for an agreed purchase price of \$290; that Honeydew melons meeting contract requirements were shipped in interstate commerce and accepted by respondent; but that respondent has not paid the contract price or any part thereof.

Respondent's failure to pay the agreed contract purchase price is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$290, with interest, and the facts should be published.

#### ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$290, with interest thereon at the rate of 5 per cent per annum from November 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2464)

**AMERICAN FRUIT GROWERS, INC. v. S. D. MONASH PRODUCE CO. PACA**  
Doc. No. 5186. Decided May 31, 1950.

**Failure of Buyer to Accept Produce and Pay Loss Incurred on Resale after Rejection**

Where complainant tendered delivery to respondent of one carload of cabbage meeting contract requirements specifying "18-20 heads per crate," respondent refused to accept delivery, and a loss was incurred on complainant's resale of the shipment, held, respondent's rejection of the cabbage was in violation of section 2 of the act for which reparation, plus interest, should be awarded complainant.\*

*Mr. Harry S. Dunmire*, of Pittsburgh, Pennsylvania, for complainant. *Mr. Fred Stua*, of Cleveland, Ohio, for respondent. *Mrs. Ilene M. Crigler*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding arising under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C., 1946 ed., 499a *et seq.*). Complainant alleges that it sold and delivered to respondent a carload of cabbage; that the cabbage met contract requirements; but that upon arrival of the shipment at destination it was rejected by respondent. It is further alleged that resale of the shipment made by the broker, at complainant's request, resulted in a net loss to complainant of \$375.89, for which reparation is sought. A copy of the report of investigation prepared by the Regulatory Division was served by registered mail upon the complainant on September 23, 1949. A copy of the formal complaint, and a copy of the report of investigation, were served by registered mail upon respondent on September 24, 1949. Respondent filed an answer to the formal complaint in which it is alleged that the cabbage delivered by complainant failed to meet contract requirements in that it was of a larger size than agreed upon. Respondent takes the position that its rejection of the shipment was therefore justified and that it is not liable to complainant in any amount.

The amount involved is less than \$500. The case is therefore handled in accordance with the shortened method of procedure provided by the rules of practice.

**FINDINGS OF FACT**

1. Complainant is a corporation, American Fruit Growers, Inc., whose post office address is 1116-1117 Oliver Building, Pittsburgh, Pennsylvania.

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

2. Respondent is an individual, Sam Dave Monash, trading as the S. D. Monash Produce Company, whose post office address is Unit 3, Northern Ohio Food Terminal, Cleveland 15, Ohio. At the time of the transaction involved herein respondent was licensed under the act.

3. On or about April 4, 1949, in the course of interstate commerce, and through negotiations conducted by the brokerage firm of Arthur G. Benzle & Son of Cleveland, Ohio, which acted as agent for both parties in conducting such negotiations, the parties entered into an agreement for the sale by complainant to respondent of one carload of U. S. No. 1 cabbage in crates, "approx 18-20 heads to crate," at an agreed price of \$1.75 per crate delivered, shipment to be made from loading point in the State of Florida to respondent at Cleveland, Ohio.

4. On or about April 4, 1949, complainant shipped from loading point in the State of Florida, in car MDT 19507, consigned to complainant at Waycross, Georgia, one carload, containing 480 crates, of U. S. No. 1 green cabbage meeting contract requirements. On or about April 5, 1949, complainant diverted the cabbage to complainant, advise respondent, at Cleveland, Ohio. The shipment arrived in Cleveland on or about April 8, 1949, and was rejected by respondent.

5. A Federal inspection of the cabbage in car MDT 19507 was completed at Shawnee Siding, Florida, at 4:45 p. m., April 4, 1949. The inspection certificate evidencing this inspection contains the following information:

"Pack: Crates generally tight. Count ranges from 17 to 20 averaging 18 heads per crate.

"Size: Generally ranges from 1 to 5, mostly 1¾ to 3 lbs. per head.

"Grade: U. S. No. 1 Green."

6. A restricted Federal inspection of the cabbage in car MDT 19507 was made at Cleveland, Ohio, on April 9, 1949. The certificate evidencing this inspection contains the following information:

"Size: Heads generally range from 1 to 5 pounds, mostly 2 to 4 pounds. By count, range from 15 to 19 heads per crate, average 17 heads per crate.

"Grade: U. S. No. 1 Green.

"Remarks: Inspection and certificate restricted to product in upper 2 layers between doors and to top layer in remainder of load. \* \* \*"  
[The load contained 5 layers.]

7. At the request of complainant, the cabbage was resold by the broker, Arthur G. Benzle & Son. The 480 crates were resold on track on April 11, 1949, at \$1 per crate delivered. The following deductions were made by the broker from the gross proceeds of \$480: Freight \$418.78, Demurrage \$2.27, Government Inspection \$7.50, Extra Top Ice \$13.62, Brokerage none. Said deductions totaled \$442.17, leaving net proceeds of \$37.83, which were remitted to complainant.

8. Although requested to do so, respondent has failed and refused to pay complainant the amount claimed or any part thereof.

9. The formal complaint was filed on June 27, 1949, which was within 9 months after the cause of action accrued.

### CONCLUSIONS

It is clear that the parties entered into the sale agreement under discussion, and that the agreement provided for the delivery by complainant to respondent of one carload of U. S. No. 1 cabbage in crates "approximately 18-20 heads to crate." This information is shown on the Brokers Standard Memorandum of Sale, and is undisputed. Respondent's position is that the cabbage delivered was too large; that is, that it averaged 17 heads per crate and that complainant had notice respondent could not use cabbage of this size. Complainant contends that the cabbage delivered met contract requirements.

The contract called for cabbage of *approximately* 18 to 20 heads to the crate. Information supplied by the broker, which is contained in the investigation report made a part of the record, shows that at the time of conducting the negotiations respondent specified that he did not want any large cabbage. Respondent declined to accept an offer of a carload of cabbage that ran 15 heads and smaller to the crate because it was too large. Respondent did, however, order a car which ran approximately 18 to 20 heads. With reference to the confirmation of sale which was prepared pursuant to this order, the broker stated further as follows:

"He [Monash] allowed us to put the approximately in the confirmation as he told us that if there were few crates that ran 16 or 17 heads and a few crates that ran 22 or 23 heads, he would not kick. However, he wanted practically all of them to run 18 to 20 heads."

Had the parties agreed upon cabbage "at least" 18 to 20 heads per crate the situation would be different. In that event there would be less basis for permitting any tolerance or deviation from the specified size. See *A. Levy and J. Zentner v. Thomas M. Zingali*, 8 A. D. 1014. Here, however, the parties agreed that the cabbage was to run "approximately" 18 to 20 heads per crate. "Approximately" has been defined to mean "Near to correctness; nearly exact; not perfectly accurate; as approximate results or values." Webster's New International Dictionary. Thus, according to the generally accepted meaning of the term, and the express intention of the parties, it is clear that complainant was not required to deliver cabbage in crates each of which con-

tained 18 to 20 heads. Enough has been said to show that some deviation from the 18 to 20 head size was permissible under the contract.

The shipping point inspection certificate shows that the size of the cabbage ranged "from 17 to 20 averaging 18 heads per crate." Allowing a slight variation from size specifications, as is permissible under the contract, this certificate indicates that the cabbage delivered met contract requirements.

As evidence that the cabbage delivered was too large, respondent places reliance upon the restricted destination certificate which shows that the cabbage inspected at Cleveland ranged from 15 to 19, with an average of 17 heads per crate. This certificate does not purport to reverse the shipping point inspection certificate. Rather, the inspection was restricted to the upper two layers between doors and to the top layer in the remainder of the load. The car contained five layers. Obviously, the finding revealed by the restricted inspection cannot and should not be accepted in disproof of the unrestricted Florida inspection. Respondent apparently knew of the Florida inspection but did not secure an appeal inspection. Accordingly, we think that, as evidenced by the unrestricted shipping point inspection certificate, complainant delivered cabbage which met contract requirements. Respondent's rejection of the shipment was, therefore, unjustified and in violation of section 2 of the act.

With respect to the question of damages, the evidence shows that the cabbage was resold for gross proceeds of \$480. This was a delivered sale and the freight charges deducted by the broker may not properly be deducted from this amount. Other expenses of sale properly deductible include \$2.27 for demurrage and \$13.62 for extra top ice. This leaves net proceeds of resale of \$464.11. This amount applied to the original contract price of \$840 delivered leaves a difference of \$375.89, which is the amount of damages suffered by the complainant. Complainant should be awarded reparation for the amount of damages, plus interest, and the facts should be published.

#### ORDER

Within 30 days from the date hereof, respondent shall pay to complainant, as reparation, \$375.89, plus interest thereon at the rate of 5 percent per annum from May 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.



(No. 2465)

NEAL TYLER & SONS *v.* CASH PRODUCE. PACA Doc. No. 5345. Decided May 31, 1950.

**Failure to Pay Balance of Purchase Price—Default**

Where respondent failed to pay the balance of the agreed purchase price of certain fruits and vegetables and failed to file an answer, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint, and his failure to pay the balance of the agreed price is a violation of section 2 of the act for which reparation, with interest, should be awarded complainant.\*

*Neal Tyler & Sons*, of Jacksonville, Florida, complainant *pro se*. *Mr. Webster P. Maxson*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding brought under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 *et seq.*), to recover the balance of the purchase price of certain fruits and vegetables sold and delivered by complainant to respondent on September 18, 20 and 22, 1949. Informal complaint was received by the Department on January 18, 1950. Formal complaint was filed April 10, 1950.

A copy of the formal complaint was served upon respondent on April 14, 1950. On the same date both parties received copies of the report of investigation made by the Fruit and Vegetable Branch.

At the time of service of the complaint, respondent was notified in writing that he had 20 days in which to file an answer, and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint. Respondent has failed to file an answer, and this proceeding is disposed of on the basis of such default.

**FINDINGS OF FACT**

1. Complainant, Neal Tyler & Sons, is a partnership composed of Neal F. Tyler, Sr., Bruce L. Tyler, Neal F. Tyler, Jr., and Jean C. Tyler, whose post office address is P. O. Box 445, Jacksonville, Florida.

2. Respondent is an individual, J. R. Fleming, doing business as Cash Produce, whose address is Route #2, Brunswick, Georgia. Respondent was licensed under the act at the time of the transactions involved herein.

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

3. On September 18, 1949, complainant, by oral contract, sold to respondent in the course of interstate commerce 2 boxes of grapefruit at \$4.50 per box, 2 crates of Persian melons at \$5.00 per crate, 3 sacks of California potatoes at \$4.75 per sack, and 12 bunches of radishes for \$1.00, total agreed price, \$34.25, f. o. b. respondent's truck at complainant's warehouse in Jacksonville, Florida.

4. On September 20, 1949, complainant, by oral contract, sold to respondent in the course of interstate commerce, 2 boxes of grapefruit at \$4.50 per box, 3 sacks of California potatoes at \$4.75 per sack, 4 boxes of oranges at \$7.00 per box, 1 bushel of endive for \$3.50, and 3 pounds of white turnips for \$.25, total agreed price, \$55.00, f. o. b. respondent's truck at Jacksonville, Florida.

5. On September 22, 1949, complainant, by oral contract, sold to respondent in the course of interstate commerce, 2 boxes of grapefruit at \$4.50 per box, 2 sacks of California potatoes at \$4.75 per sack, 4 boxes of oranges at \$6.50 per box, 1 crate and 1 lug of avocados for \$7.00, 1 bushel of Chinese cabbage for \$4.00, 5 crates of cantaloups at \$6.50 per crate, and 2 crates of cauliflower at \$3.50 per crate, total agreed price, \$95.00, f. o. b. respondent's truck at Jacksonville, Florida.

6. All the fruits and vegetables so purchased were delivered to respondent and accepted by him.

7. The total agreed price for all three sales was \$184.25. On November 30, 1949, respondent paid complainant \$10, but has since refused and neglected to pay the balance or any part thereof.

8. Informal complaint was filed within nine months after the cause of action accrued.

### CONCLUSIONS

Failure of respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint as provided in the rules of practice (7 CFR 47.8 (c)).

The facts presented in the case are that complainant, on September 18, 20, and 22, 1949, by oral contracts, sold to respondent various commodities listed in detail above, for a total agreed price of \$184.25, f. o. b. respondent's truck at Jacksonville, Florida, the intended destination of each of these shipments being Brunswick, Georgia; that respondent accepted each of these truck shipments but has paid only \$10, leaving a balance due of \$174.25, and has refused and neglected to pay the remainder or any part thereof.

Respondent's failure to pay the balance of the purchase price is a violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$174.25, plus interest, and the facts should be published.

**ORDER**

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$174.25, with interest thereon at the rate of 5 per cent per annum from October 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2466)

**SAN PAT VEGETABLE CO., INC. v. CURTIS & COMPANY.** PACA Doc. No. 5102. Decided May 31, 1950.

**Failure to Pay Balance of Purchase Price**

Where seller of a carload of parsley requested and obtained buyer's permission to use a different crate for the shipment than was ordinarily used, representing that the proposed crate was larger, a good crate for parsley, and the same crate for which another shipper of Texas parsley received premium prices, held, the use of a crate with inside dimensions of 6 by 18 by 22 inches was in compliance with the terms of the agreement, and buyer's refusal to pay the full purchase price was a violation of section 2 of the act for which complainant is entitled to an award of reparation for the balance of the purchase price.\*

*Mr. Neil A. Riley*, of Moore and Riley, of Minneapolis, Minnesota, for complainant. *Mr. D. Jerome Donovan*, of Donovan and Higgins, of Boston, Massachusetts, for respondent. *Mr. James A. O'Donnell*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). An informal complaint was received on September 14, 1948. A formal complaint was filed February 14, 1949, alleging failure on the part of respondent to pay in full the purchase price for a carload of parsley bought from complainant on or about April 15, 1948. A copy of the Department's report of investigation was served upon complainant's attorney on February 25, 1949. On the same day copies of the report of investigation and the formal complaint were served upon the respondent.

Respondent filed an answer on March 4, 1949, denying generally the allegations of the complaint and requesting an oral hearing. The answer contained a counterclaim for \$155.33, covering an alleged breach of contract by complainant. In replying to the answer, com-

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

plainant pointed out that the affirmative relief requested by respondent was improper since respondent's counterclaim was not filed within the statutory period required by the act. In its brief respondent admits that the countercomplaint cannot be considered on its merits in this proceeding for that reason.

Oral hearing was held in Boston, Massachusetts, on September 23, 1949. Both parties were represented by counsel. Although no witnesses appeared for complainant at the hearing, the deposition testimony of six complainant witnesses was received in evidence. Three witnesses testified for respondent at the hearing.

#### FINDINGS OF FACT

1. Complainant, San Pat Vegetable Co., Inc., is a corporation whose post office address is Pharr, Texas.

2. Respondent is an individual, Samuel Silk, doing business as Curtis & Company, whose post office address is 104-106 Faneuil Hall, Boston 9, Massachusetts. At the time of the transaction involved herein, respondent was licensed under the act.

3. On or about April 15, 1948, through Louis S. Witte, a broker located at Weslaco, Texas, complainant sold to respondent 446 crates of U. S. No. 1 plain parsley and 408 crates of U. S. No. 1 curly parsley, or a total of 854 crates, at \$1.20 per crate, or \$1,024.80 total price, f. o. b. Pharr, Texas.

4. A crate with inside dimensions of 8 by 12 by 22 inches is frequently used for shipments of parsley from Texas, and is the crate complainant could properly have used in filling respondent's order in the absence of authority to use a different crate. On April 16, 1948, complainant requested and was granted authority to use a different crate, described by complainant as a "good crate for parsley," larger than the regular crate, and the same crate for which another Texas shipper received premium prices.

5. On April 16, 1948, complainant shipped to respondent, in car REX 1618, 854 crates of parsley that complied fully with the terms of the contract as amended. The crates used had inside dimensions of 6 by 18 by 22 inches. Respondent accepted the shipment, but has remitted only \$195.17, leaving a balance due of \$829.63.

6. Informal complaint was filed within 9 months after the cause of action accrued. Respondent's countercomplaint was not filed within 9 months from the date the alleged cause of action accrued.

#### CONCLUSIONS

The original contract in this case was negotiated on April 15, 1948. The dispute arises out of a subsequent modification of this original contract relative to the containers in which the parsley was to be

shipped. On April 16, 1948, complainant called the broker, Louis S. Witte, to request permission to use a crate with inside dimensions of 6 by 18 by 22 inches, instead of the 8 by 12 by 22 inch crate regularly used for parsley shipments. Complainant told the broker that the crate which it proposed using was slightly larger and would permit packing larger bunches of parsley and more ice in the pack. It further represented that another Texas shipper of parsley, Coate-Fox-Price, regularly used this crate for parsley and, in fact, received a premium therefor. Mr. Witte relayed all this information to respondent, except for information as to dimensions. Respondent agreed to the substitution on condition that the proposed crate would be a "good crate for parsley."

Since respondent has at no time complained of the quality or condition of the commodity received, we are concerned here only with the issue of whether or not complainant breached its contract by using the 6 by 18 by 22 inch crate. This issue resolves itself to five simple questions: (1) Was the crate furnished a "good crate for parsley?" (2) Was this crate larger than the crate regularly used for Texas parsley? (3) Did the crates shipped contain larger bunches? (4) Did these crates contain more pack ice? (5) Were these crates the same crates for which Coate-Fox-Price received a premium? If, from the evidence, we conclude that these questions are answered in the affirmative, then there has been no breach of contract, and complainant must prevail.

Respondent offers two arguments to assist us in our consideration of the first question, whether this crate was a "good crate for parsley." It is alleged that the crate furnished was not a good crate because (1) it is a different crate than that usually offered on the Boston market, and (2) it is a cauliflower crate, and respondent would not have given its permission had it known it was going to be a cauliflower crate. Neither of these arguments is well taken. As to the first argument, respondent maintains that although parsley packed in cauliflower crates may be easily salable on the New York market, it is extremely difficult to sell such crates on the Boston market because of the peculiar suspicion of Boston buyers of any crate different from that to which they are accustomed. Even though respondent's proof on this point is weak, we do not doubt the truth of this contention. A "different" crate is probably more difficult to sell than one to which Boston buyers are accustomed. However, respondent now is estopped to complain of the fact that complainant did the very thing which respondent gave him permission to do, namely, to use a "different" crate. The gist of complainant's request for modification was: "Will you give us permission to use a different crate?" The answer was in the affirmative. Thus, if the use of a different crate was imprudent,

the loss must fall on the respondent, for that is the very thing respondent authorized. Respondent emphasizes complainant's knowledge that this shipment was to be sold on the Boston market, arguing that complainant was thereby under a duty to furnish a pack which would meet the peculiar demands of Boston buyers. Even if complainant in Texas, could be so charged with knowledge of the peculiarities of the Boston market, which of course, he cannot, still, obtaining respondent's permission before using a different crate absolves complainant completely.

As for the second argument, if respondent felt that it could not sell parsley in cauliflower crates, and if permission to use a different crate would not have been granted had the respondent known the use of cauliflower crates was contemplated, then it was certainly incumbent upon the respondent to withhold permission to use a different crate until the nature of the proposed crate was fully understood. The modification of the contract must be viewed objectively. Complainant cannot be held responsible for whatever secret reservations respondent may have had at the time it agreed to the modification.

No other reason appearing why the substituted crate was not a good crate for parsley, we must conclude that it was a good crate, as stated by all six of complainant's witnesses. We move on, then, to the remaining four questions.

Although the evidence is conflicting as to the size of the crate regularly used for shipments of Texas parsley, the weight of the evidence clearly indicates that the 8 by 12 by 22 lettuce and vegetable crates would probably have been used under the original contract and would have been accepted without complaint on the part of the buyer. It is therefore with this crate that the substituted crate must be compared. Clearly, the 6 by 18 by 22 cauliflower crate is larger.

Not only Burton Benson, complainant's vice president, and Edward P. Danner, its packing house foreman, but also Mr. M. A. Torline, a Texas Department of Agriculture inspector, testified that the bunches packed in this shipment were as large or larger than those regularly packed. The inspection report indicates a tight pack. Since this evidence is uncontradicted, we must conclude that the implied warranty as to size of bunches was not breached. These same witnesses also testified that the packs contained plenty of ice, but this was made relatively immaterial by the fact that the parsley arrived in good condition.

Mr. A. L. Price, a partner in the firm of Coate-Fox-Price, states in his deposition that the cauliflower crate is regularly used by his firm and that they get a premium for it, thus verifying complainant's representation on this score. This evidence is uncontradicted.

For the reasons stated, it is concluded that complainant performed fully its obligations under the amended contract between the parties and is entitled to receive from respondent the full contract price. Respondent's failure to pay to complainant the balance of \$829.63 due is in violation of section 2 of the act. Reparation in that amount, with interest, should be awarded to complainant and the facts should be published.

Respondent's counterclaim was not filed within 9 months from the date the alleged cause of action accrued and must be dismissed for lack of jurisdiction. Since the counterclaim is predicated on a breach of the contract by complainant and we find no such breach, the counterclaim would also be subject to dismissal on the merits.

### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$829.63, with interest thereon at the rate of 5 percent per annum from May 1, 1948, until paid.

Respondent's countercomplaint is dismissed.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2467)

ROSENTHAL COMPANY, INC. *v.* EVANSVILLE FRUIT COMPANY. PACA  
Doc. No. 5346. Decided May 31, 1950.

### Failure to Pay Balance of Purchase Price—Default

Where complainant sold a truckload of mixed fruits and vegetables to respondent who accepted delivery but failed to pay the full purchase price, and where respondent failed to file an answer to the complaint, held, that respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint, and its failure to pay the balance of the purchase price is a violation of the act for which reparation should be awarded complainant, with interest.\*

*Messrs. Foley & Foley*, of Chicago, Illinois, for complainant. *Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Informal complaint was received February 2, 1949. Formal complaint

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

was filed October 17, 1949, alleging that complainant sold a truckload of mixed fruits and vegetables to the respondent on or about September 9, 1948, for \$494.80 and that respondent paid complainant \$194.80, leaving a balance due of \$300, no part of which has been paid.

The Regulatory Division of the Fruit and Vegetable Branch made an investigation and a copy of its report thereon was served on the complainant's attorney on November 28, 1949. Copies of the formal complaint and the report of investigation were served on respondent on the same date. A supplemental report of investigation was served on complainant's attorney April 27, 1950, and on the respondent April 28, 1950.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint. Respondent has failed to file an answer and this proceeding is disposed of on the basis of the formal complaint and the reports of investigation.

#### FINDINGS OF FACT

1. Complainant, Rosenthal Company, Inc., is a corporation whose address is 1425 South Racine Avenue, Chicago, Illinois.

2. Respondent is an individual, Wilbur W. Lawrence, trading as Evansville Fruit Company, whose address is 310 N. W. 9th Street, Evansville, Indiana. At the time of the transaction complained of herein, respondent was licensed under the act.

3. On or about September 9, 1948, complainant sold to respondent one truckload of mixed fruits and vegetables consisting of peaches, grapes, cantaloups, eggplant, and peppers for the agreed purchase price of \$494.80.

4. Produce that conformed with the terms of the contract as to kind, quality, grade and size was shipped from Benton Harbor, Michigan, to the respondent in Evansville, Indiana.

5. Respondent accepted the produce upon arrival at destination and paid complainant \$164.80. On May 13, 1949, respondent paid complainant \$30, and after receipt of the formal complaint, paid an additional \$50, leaving an unpaid balance of \$250.

6. Informal complaint was filed February 2, 1949, which was within nine months after the cause of action accrued.

#### CONCLUSIONS

Failure of the respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint as provided for in the rules of practice (7 CFR 47.8 (c)).



The facts thus admitted are that complainant sold to respondent a truckload of mixed fruits and vegetables for an agreed purchase price of \$494.80; that fruits and vegetables meeting contract requirements were shipped in interstate commerce and accepted by respondent; that respondent paid complainant \$194.80, leaving a balance due of \$300. Subsequent to the filing of the formal complaint, respondent has paid an additional \$50, leaving a balance due of \$250, no part of which has been paid.

Respondent's failure to pay the full contract purchase price is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$250, with interest, and the facts should be published.

#### ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$250, with interest thereon at the rate of 5 per cent per annum from October 1, 1948, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

## COURT DECISIONS

**BALAZS ET AL. v. ANDERSON, SECRETARY OF AGRICULTURE, ET AL.\* 77**  
F. Supp. 612. Decided March 5, 1948.

### DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

Civil Action No. 25208

#### Administrative Law—Scope of Judicial Review of Milk Order Issued by Secretary—Conclusiveness of Findings Made by Judicial Officer

In a suit to review an order of the Secretary of Agriculture sustaining the validity of Order No. 75 regulating the handling of milk in the Cleveland marketing area, held, not a trial de novo, since the review required by the act is limited to the record made in the administrative proceeding, and the Judicial Officer's findings are conclusive unless contrary to law or unsupported by the evidence.\*\*

#### Function of Interrogatories and Production of Records—Federal Rules of Civil Procedure

The office of interrogatories and production of records under the Rules of Civil Procedure is to aid the parties and the court in the orderly disposition of litigation but not to supply information for the personal use of litigants.\*\*

[† 613] Suit by Joseph Balazs, doing business as Balazs Dairy Products, and others, against Clinton P. Anderson, Secretary of Agriculture, and others, to review an order of the Secretary of Agriculture sustaining the validity of an order regulating the handling of milk. On defendants' objection to plaintiffs' interrogatories and on plaintiffs' motion to produce records.

Objection to interrogatories sustained and motion to produce records denied.

*Walter & Haverfield, Paul W. Walter and Loyal V. Buescher*, all of Cleveland, Ohio, for plaintiffs.

*Don C. Miller*, U. S. Atty., of Cleveland, Ohio, for defendants.

FREED, District Judge:

The instant suit is a review proceeding brought under the provisions of Title 7 U. S. C. A. § 608c (15) (B) to review the order of the Secretary of Agriculture sustaining the validity of order No. 75. The order regulates the handling of milk in the Cleveland Marketing area.

\*Avon Dairy Company et al., 6 A. D. 885, sustained.

\*\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

† Italic figures in brackets refer to first word beginning a page in 77 F. Supp. 612.—Ed.

## 77 F. Supp. 612

The interrogatories of the Plaintiffs and the motion to produce records seek evidence to support Plaintiffs' attack of the Secretary's order.

[1] This Court's power is prescribed by the statute which authorizes the review. The suit in this Court is not a trial de novo. The review must be limited to the record made in the administrative proceedings. The Judicial Officer's findings of September 15, 1947, are conclusive unless they are contrary to law, or unless they are not supported by evidence. *Mullins et al. v. De Sota Bank & Trust Co.*, 5 Cir., 149 F. 2d 864; *New York State Guernsey Breeders' Co-op., Inc. v. Wickard*, 2 Cir., 141 F. 2d 805, 153 A. L. R. 1165, certiorari denied 323 U. S. 725, 65 S. Ct. 58, 89 L. Ed. 582.

[2] The office of interrogatories and production of records under Chapter V of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, is to aid and assist the parties and the court in the orderly disposition of litigation, but not to supply information for the personal use of the litigants.

The objection to interrogatories is sustained and the motion to produce records is denied.

# INDEX-DIGEST AND SUBJECT-INDEX OF AGRICULTURE DECISIONS

MAY 1950

## AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

### APPLICATION FOR INTERIM RELIEF

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Denial of, from operation of amendments to Order No. 30 during pendency of decision on merits.....	2434	570

### DISMISSAL

#### FAILURE TO APPEAR

Since petitioner failed to appear, pursuant to the rules of practice under the act, his petition is dismissed with prejudice.....	2433	567
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#### WITHDRAWAL OF COMPLAINT

Complaint to review action of the market administrator dismissed upon request of complainant.....	2435	570
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### INTERIM RELIEF

Denial of application for, from operation of amendments to Order No. 30 during pendency of decision on merits.....	2434	570
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### IRREPARABLE DAMAGE

#### DENIAL OF APPLICATION FOR INTERIM RELIEF FOR FAILURE TO SHOW

Where petitioners claimed that the damage they may sustain in connection with the payment procedure required by the amendments to Order No. 30 will result from possible cases where a producer will dispute the cooperative's right to collect his payment, and if the producer should be successful in establishing his right to the payment the handler may have to make the payment twice, held, that the claim of possible irreparable damage is untenable, since should such a case arise the handler would always have recourse against the cooperative, and therefore, petitioners' application for interim relief should be denied.....	2434	568
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### ORDER NO. 30 (TOLEDO, OHIO)

#### DENIAL OF INTERIM RELIEF FROM OPERATION OF

Where petitioners, subject to Order No. 30, regulating the handling of milk in the Toledo, Ohio Marketing Area, filed on April 13, 1950, a petition challenging legality of amendments to Order No. 30, relating to payments to be made to cooperatives upon their request, instead of directly to producers, which were issued on March 28, 1950, to become effective on May 1, 1950, and said petition was accompanied with an application for interim relief from the operation of the amendments during the pendency of the decision on the merits, the Judicial Officer held that since the petitioners failed to show that they would suffer irreparable damage during the pendency of the proceeding, petitioners' request for interim relief should be denied and the application dismissed.....	2434	567
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MAY 1950

**PACKERS AND STOCKYARDS ACT, 1921****BOOKS AND RECORDS**

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Respondent ordered to keep, as will fully and correctly disclose all transactions in its business.....	2441	587

**CEASE AND DESIST****VIOLATION OF ACT**

Inasmuch as respondent admitted the charges in the complaint and consented to the issuance of an order in this proceeding, respondent is directed to cease and desist from causing false entries to be made in the books kept for him by his clearing agency and from engaging in practices designed to deceive his clearing agency.....	2443	598
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Respondent is ordered to cease and desist from engaging in the business of buying and selling livestock as a dealer without registering with the Secretary and furnishing bond in connection therewith; intermingling livestock consigned to him for sale on a commission basis with livestock owned by respondent or a trading partnership composed of respondent and others for purpose of selling respondent's or trading partnership's livestock without obtaining in advance the consent of consignors for such intermingling; making such use of shippers' proceeds funds as would endanger or impair the prompt and faithful accounting therefor and payment of such funds to proper parties; and, intermingling or confusing shippers' proceeds funds with other accounts or funds of respondent; and respondent is further ordered to (1) keep such accounts, records, and memoranda as will correctly and fully disclose all transactions involved in his business and (2) deposit the gross proceeds received from the sale of livestock handled on a commission basis and any other funds that come into his possession as an agent in a separate bank account which shall be drawn on only for certain specified purposes..	2441	583
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**CONTRACT OF PURCHASE AND SALE**

Transaction constituting, not on commission basis.....	2439	580
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**COST OF FEED**

Cost of feed consumed by misrepresented ewes after complainant accepted the animals is not recoverable.....	2439	580
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**DAMAGES**

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Measure of, based on misrepresentation.....	2439	580
Propriety of allowing unproved items of, need not be considered.....	2439	580

MAY 1950

**PACKERS AND STOCKYARDS ACT, 1921—Continued**

**DEPOSITS OF PROCEEDS**

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Respondent ordered to make, in separate bank account.....	2441	587

**DISMISSAL**

**FAILURE TO PROVE VIOLATION OF ACT**

Since the facts fail to prove that respondent stockyard company violated the act by refusing to allot pen space to complainant to operate as a market agency, the complaint filed in this proceeding is dismissed.....	2442	588
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**FAILURE TO SHOW LACK OF JUST, REASONABLE, OR NONDISCRIMINATORY PRACTICES**

Where complainant delivered a diseased sow to defendant for handling and sale on a commission basis and, because of this fact defendant could find no buyer for it, and, having no contrary instructions, followed the general usage of the trade in disposing of sick or crippled animals by selling "subject", it is held, that a sale "subject" is not an unjust, unreasonable, or discriminatory practice and, therefore, plaintiff's complaint for alleged damages should be dismissed.....	2438	574
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**CONTINUATION OF**

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Failure of broker or buyer to make prompt objection to confirmation of sale containing the term "f. o. b. acceptance final" is regarded as evidence that this term was an agreed provision of the contract.....	2450	610
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Where respondent failed to remit proceeds of sale for 157 bushels of sweet potatoes delivered to respondent to be sold by him on a commission basis and the latter received and sold the sweet potatoes but failed to account or to remit the net proceeds of sale to complainant, held, complainant is entitled to recover damages amounting to the reasonable market value of the sweet potatoes delivered less the amount of respondent's commission.....	2445	601
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## SETTLEMENT BETWEEN PARTIES

The Department having received a letter dated April 24, 1950, from complainant's authorized representative, to the effect that claim for reparation has been settled between the parties and that dismissal is requested, the complaint is accordingly dismissed----	2446	603
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The Department having received a letter dated April 11, 1950, from complainant's attorney, to the effect that the claim against respondent has been settled and requesting the matter to be closed, the complaint is accordingly dismissed-----	2449	609
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Where complainant's attorney notified the Department that the dispute had been settled and compromised, and authorized dismissal of the complaint, the complaint is accordingly dismissed-----	2455	633
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## EVIDENCE

Failure of broker or buyer to make prompt objection to confirmation of sale containing the term "f. o. b. acceptance final" is regarded as evidence that this term was an agreed provision of the contract-----	2450	613
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## F. O. B. ACCEPTANCE FINAL SALE

## MEANING OF TERM

The term "f. o. b. acceptance final" in a contract of purchase and sale means that the buyer surrenders his right of rejection as well as the right to assert the defense of suitable shipping condition-----	2450	610
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## JOINT ACCOUNT

## LIABILITY OF PURCHASER ON

Purchase of produce on joint account renders the purchasers liable as partners to the seller who can hold either party liable for the full amount involved-----	2450	610
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**NOTICE****NOTICE TO PARTNER NOTICE TO ALL**

Notice to one partner is notice to all; and where reparation is awarded against a partner in one proceeding, the copartner may be held liable for contribution in a second proceeding.....	2451	616
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**PARTNERSHIP****LIABILITY OF COPARTNER FOR CONTRIBUTION**

Where a partner is ordered to pay a reparation award in one proceeding, his copartner may be held liable for contribution in a second proceeding notwithstanding the copartner was not made a party to the first proceeding.....	2451	616
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**LIABILITY OF PARTNER**

A partner owes the utmost good faith to his copartner, though in matters of judgment he will not be liable for a loss caused by honest mistake or error of judgment not amounting to wantonness or fraud.....	2451	616
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**OBLIGATION OF PARTNER ON DEBT DUE FROM**

The obligation of partners on a partnership debt based on contract is joint and not joint and several; and where a partner pays more than his share to a judgment creditor he is entitled to contribution from his copartner.....	2451	616
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**REJECTION OF COMMODITY**

Failure to accept and pay loss incurred on resale of commodity after.....	2464	654
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**REPARATION****CONTRIBUTION BY PARTNER ON JOINT ACCOUNT AGREEMENT**

Where it is found that the parties entered into a joint account agreement for the purchase and handling of three carloads of celery, and one of the partners was ordered by the Department to pay the seller an award of reparation arising in connection with the purchase, the copartner is liable for and should contribute half of whatever his partner paid pursuant to the reparation order notwithstanding the copartner was not made a party in the first proceeding and, in order to give the parties an opportunity to settle on this basis, the case is held in abeyance pending the issuance of a further order.....	2451	615
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**PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Continued****REPARATION—Continued**

<b>FAILURE TO ACCOUNT AND PAY</b>	<b>No.</b>	<b>Page</b>
Where, pursuant to the agreement of the parties, the respondent received and sold 157 bushels of sweet potatoes on a commission basis for complainant, but failed and refused to render complainant an accounting or to remit the proceeds of sale, and where respondent failed to file an answer to the formal complaint, held, respondent's failure to answer constitutes an admission of the facts alleged in the complaint and a waiver of hearing, and respondent's failure to account and pay to complainant the proceeds from the sale of the produce on commission constitutes a violation of the act for which reparation with interest should be awarded complainant.....	2445	601
<b>FAILURE TO PAY</b>		
Where complainant seeks to recover the balance of the purchase price for three truckloads of potatoes sold to respondent and also the cost of a telephone call made on behalf of respondent in connection with the sale, and where respondent failed to file an answer, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint, and his failure to pay is a violation of section 2 of the act for which complainant is entitled to an award of reparation in the amount due.....	2447	604
<b>FAILURE TO PAY BALANCE OF LOSSES ON RESALE</b>		
Where respondent contracted with complainant's assignor for the purchase of two carloads of apples but subsequently refused to accept delivery of either shipment and agreed to reimburse the shippers for any losses sustained on resale of the apples but has paid only a part of these losses, and has failed to answer the complaint, it is held, that failure to answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, and failure to pay is in violation of the act, and complainants' assignee should be awarded reparation in the amount of the unpaid balance of the losses sustained on resale of the produce.....	2460	644
<b>FAILURE TO PAY BALANCE OF PURCHASE PRICE</b>		
Where complainant sold a truckload of mixed fruits and vegetables to respondent who accepted delivery but failed to pay the full purchase price, and where respondent failed to file an answer to the complaint, held, that respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint, and its failure to pay the balance of the purchase price is a violation of the act for which reparation should be awarded complainant, with interest.....	2467	662

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## REPARATION—Continued

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Where complainant sold and delivered to respondent 1200 50-pound cartons of frozen fancy peas, respondent failed to make payment of the purchase price, and the parties entered into a settlement agreement for an allowance to respondent and for the release of portions of the shipment upon installment payments by respondent, and respondent failed to make payment of the balance due under the settlement agreement, held, respondent's failure to pay constitutes a violation of the act, for which reparation, with interest, should be awarded complainant.....	2458	636
Where respondent failed to answer complaints alleging that respondent did not pay the full agreed price for two truckloads of mixed vegetables purchased from complainant, held, that such failure to file an answer constitutes an admission of the facts alleged in the complaints, and complainant is entitled to an award of reparation for the unpaid balance of the purchase price, plus interest.....	2448	606
Where respondent failed to pay the balance of the agreed purchase price of certain fruits and vegetables and failed to file an answer, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint, and his failure to pay the balance of the agreed price is a violation of section 2 of the act for which reparation, with interest, should be awarded complainant.....	2465	656
Where respondent failed to pay the balance of the agreed purchase price of one carload and one truckload of watermelons and failed to file an answer, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint, and his failure to pay the balance of the agreed purchase price is a violation of section 2 of the act for which reparation, with interest, should be awarded complainant.....	2462	647
Where seller of a carload of parsley requested and obtained buyer's permission to use a different crate for the shipment than was ordinarily used, representing that the proposed crate was larger, a good crate for parsley, and the same crate for which another shipper of Texas parsley received premium prices, held, the use of a crate with inside dimensions of 6 by 18 by 22 inches was in compliance with the terms of the agreement, and buyer's refusal to pay the full purchase price was a violation of section 2 of the act for which complainant is entitled to an award of reparation for the balance of the purchase price.....	2466	658

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**REPARATION—Continued**

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<b>FAILURE TO PAY BROKERAGE FEE</b>		
Where complainant, as broker, sold potatoes for respondent who paid complainant part of the agreed brokerage but failed to pay the balance due, held, that respondent's failure to file an answer to the complaint constitutes an admission of the facts alleged therein, and respondent's failure to pay the balance of the brokerage is a violation of section 2 of the act for which complainant is entitled to an award of reparation.....	2456	633
<b>FAILURE TO PAY LOSS ON RESALE OF COMMODITY</b>		
Where complainant tendered delivery to respondent of one carload of cabbage meeting contract requirements specifying "18-20 heads per crate," respondent refused to accept delivery, and a loss was incurred on complainant's resale of the shipment, held, respondent's rejection of the cabbage was in violation of section 2 of the act for which reparation, plus interest, should be awarded complainant.....	2464	652
<b>FAILURE TO PAY PURCHASE PRICE</b>		
Where complainant alleged failure of respondent to pay the agreed purchase price for two carloads of watermelons sold to and accepted by respondent, and where respondent failed to file an answer, held, that respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint, and respondent's failure to pay the agreed purchase price is in violation of section 2 of the act for which reparation, with interest, should be awarded complainant..	2459	642
Where complainant alleged failure of respondent to pay the agreed purchase price for 75 crates of honeydew melons sold and delivered to respondent, and where respondent failed to file an answer to the formal complaint, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint, and his failure to pay the agreed purchase price is in violation of section 2 of the act, for which complainant should be awarded reparation in the amount of the purchase price, with interest.....	2363	650
Where complainant alleged failure of respondent to pay the agreed purchase price for a carload of grapes sold and delivered to respondent, and where respondent failed to file an answer to the complaint, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, and respondent's failure to pay the agreed purchase price is in violation of section 2 of the act, for which complainant is entitled to an award of reparation in the amount of the purchase price, with interest.....	2453	629

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**PERISHABLE AGRICULTURAL COMMODITIES ACT, 1930—Continued****REPARATION—Continued****FAILURE TO PAY PURCHASE PRICE—Continued**

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Where it is alleged in the complaint that respondent failed to pay complainant the agreed purchase price of a truckload of oranges and grapefruit sold to respondent, and where respondent did not file an answer, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint and a waiver of oral hearing, and respondent's failure to pay the purchase price is a violation of section 2 of the act, for which reparation should be awarded complainant.....

2454 631

**UNLAWFUL REJECTION**

Where complainant sought to recover reparation for loss sustained by complainant on resale of three carloads of celery purchased by respondent under an f. o. b. acceptance final contract, which shipments were rejected by respondent, held, that under the acceptance final contract respondent had no right of rejection; by rejecting respondent waived any right to claim damages for complainant's breach of the contract; and complainant is entitled to an award of reparation for the loss sustained by him on resale of the commodity.....

2450 609

Where complainant seeks recovery of damages claimed to have resulted from respondent's rejection of four carloads of tomatoes, and respondent contends that no contract of sale was entered into and that the statute of frauds was not complied with, held, a contract of sale was negotiated between the parties by a broker and the memorandum issued by the broker satisfied the requirements of the statute of frauds, and, since the tomatoes were in accordance with the contract, the rejection was without reasonable cause and reparation should be awarded complainant for the difference between the purchase price and the net proceeds received from resale of the tomatoes....

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## APPENDIX A

### Reference to Cumulative Material of Agriculture Decisions (1942-1950)

The following cumulative material will be found in the December issue (No. 12) of Agriculture Decisions, Volumes 1 (1942), 2 (1943), 3 (1944), 4 (1945), 5 (1946), 6 (1947), 7 (1948), and 8 (1949), respectively:

#### Citations in Agriculture Decisions:

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\*HISTORICAL NOTE.—The Secretary's decision in *In re Thatford Live Poultry, Inc.*, 1 A. D. 435, decided June 3, 1942, overruled prior decisions (Table of Decisions Overruled, 1 A. D. 819) as precedents because of lack of regulation requiring current assets to exceed current liability by at least 25 percent of average weekly purchases. Since that decision, regulation (9 CFR Cum. Supp. 201.14) setting up a standard of financial qualifications has been promulgated. *In re Albert Bree*, 3 A. D. 255 (1944).—Ed.



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\*Certiorari denied by the Supreme Court on December 6, 1948, 835 U. S. 885.—Ed.

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**UNITED STATES DEPARTMENT OF AGRICULTURE**

# **AGRICULTURE DECISIONS**

**DECISIONS OF THE SECRETARY OF AGRICULTURE**

**UNDER THE  
REGULATORY LAWS ADMINISTERED IN THE  
UNITED STATES DEPARTMENT OF AGRICULTURE**

**(Including Court Decisions)**



**VOL. 9, No. 6  
(Nos. 2468-2479)**

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**under the direction of**

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## PREFATORY NOTE

It is the purpose of this official publication to make available to the public, in an orderly and accessible form, decisions issued under regulatory laws administered in the Department of Agriculture.

The decisions published herein may be described generally as decisions which are made in proceedings of a quasi-judicial (as contrasted with quasi-legislative) character, and which, under the applicable statutes, can be made by the Secretary of Agriculture, or an officer authorized by law to act in his stead, only after notice and hearing or opportunity for hearing have been given. These decisions do not include rules and regulations of general applicability which are required to be published in the Federal Register. For reasons of policy, the identities of the parties are not reported in decisions issued under one statute which expressly authorizes, but does not require the publication of the facts and circumstances of a violation, unless the Secretary in his decision has specifically ordered or directed such publication.

The principal statutes concerned are the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 1946 ed. 601 *et seq.*), the Commodity Exchange Act (7 U. S. C. 1946 ed. 1 *et seq.*), the Grain Standards Act (7 U. S. C. 1946 ed. 71 *et seq.*), the Packers and Stockyards Act, 1921 (7 U. S. C. 1946 ed. 181 *et seq.*), and the Perishable Agricultural Commodities Act, 1930 (7 U. S. C. 1946 ed. 499a *et seq.*).

The decisions published are numbered serially, in the order in which they appear herein, as "Agriculture Decisions". They may be cited by giving the volume and page, for illustration, thus: 1 A. D. 472. It is unnecessary to cite the docket or decision number. Prior to 1942 the Secretary's decisions were identified by docket and decision numbers, for example, D-578; S. 1150. Such citation of a case in these volumes generally indicates that the decision is not published in the Agriculture Decisions.

Current court decisions involving the regulatory laws administered by the Department will be published herein.

An Index-Digest and Subject-Index of the decisions reported and the court cases published herein will be found at end of each monthly issue, and the cumulative yearly Index-Digest and Subject Index, lists of decisions reported, statutes, orders, etc., construed, and statistical and other tables will be found at the end of No. 12 (December) issue of the Agriculture Decisions.

Copies of monthly issues beginning with January 1942 of the decisions will be available through the Superintendent of Documents, U. S. Government Printing Office, Washington 25, D. C.





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**UNITED STATES DEPARTMENT OF AGRICULTURE**  
**BEFORE THE SECRETARY OF AGRICULTURE**  
**AGRICULTURE DECISIONS**

(No. 2468)

*In re* **HYGIENIC DAIRY COMPANY, NORTHERN MILK CORPORATION, AND  
IRONA CREAMERIES, INC. AMA Doc. Nos. 27-89, 27-90, 27-92.**  
Decided June 14, 1950.

**Order No. 27—Verification of Shipment Records for Classification—Burden  
as to Examination of Shipment Records—Reaudit of Shipment Records—  
Milk Market Administrator's Refusal to Direct Reaudit of Shipment Records  
Justified**

Where petitioners, subject to the New York Milk Order, complained of the milk market administrator's failure to verify, several years ago, petitioners' shipment reports, and if this had been done the records would have shown that the ice cream in question has been shipped outside the city of New York thus entitling it to a lower classification than Class II-B, and that the market administrator, several years later, refused to reaudit and reclassify petitioners' ice cream in a lower classification, the Judicial Officer held that the burden was upon the petitioners to see that the shipment records were examined if they wished a classification dependent upon such records, and, furthermore, the evidence in the record discloses that petitioners' reported classification was intentional and not inadvertent, and, therefore the market administrator did not fail in the duty of verification because his auditors at the time of the audits, a number of years ago, did not seek out the petitioners' shipment records of the ice cream.\*

**Circumstances Justifying Milk Market Administrator's Refusal to Direct Reaudit of Shipment Records**

Under the circumstances disclosed in the record the market administrator did not act arbitrarily or unlawfully in refusing to incur the expense necessary to a reaudit to determine, not only to what points Loft shipped the ice cream, but to determine that it never reentered New York City.\*

**Extent of Auditing Reports for Purposes of Verification Matter of Discretion with Milk Market Administrator**

Since the extent of auditing reports for verification purposes is largely a matter of discretion with the milk market administrator, it cannot be ruled that for the advantage of the petitioners in this proceeding the milk market administrator as a matter of law should have investigated further in giving the petitioners a lower classification than that originally reported.\*

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

*Poletti, Diamond, Freidin and Mackay*, New York, New York, for petitioners.  
*Messrs. Julius C. Krause and John G. Liebert* for Production and Marketing  
 Administration. *Mr. Earl J. Smith*, Hearing Examiner.

*Decision by Thomas J. Flavin, Judicial Officer*

#### PRELIMINARY STATEMENT

This is a proceeding under Section 8c (15) (A) of the Agricultural Adjustment Act (1933), as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 601 *et seq.*). Petitioners are handlers subject to Order No. 27, as amended, which regulates the handling of milk in the New York metropolitan marketing area. The three petitions were consolidated for hearing, and the hearing was held in New York, New York, on May 19 and 20, 1949, before Earl J. Smith, Hearing Examiner. Thereafter, petitioners filed suggested findings of fact and briefs were filed by all parties. The examiner issued a report containing proposed findings of fact, conclusions and order which recommended dismissal of the petitions. The petitioners filed exceptions to the report together with a supporting brief. Oral argument upon the exceptions was held before me in New York, New York, on February 14, 1950.

The controversy arises from the refusal of the market administrator to reaudit and reclassify the milk equivalent of cream sold by petitioners Hygienic Dairy Company and Northern Milk Corporation and by the predecessors of Iroha Creameries, Inc., to Loft Candy Corporation, through Hershey Farms, Inc., for the period May 1940 to June 1944. It was agreed that, if it was decided that the petitioners had a right to reaudit and reclassification, the amounts involved would be determined by the reaudit.

The petitioners reported the cream in their monthly reports as Class II-B and accounted for the milk equivalent on that basis. The petitioners contend that the proper classification is Class II-F or, for part of the period involved, Class III or III-C, because the cream was manufactured into ice cream or frozen desserts which were shipped out of, and remained outside of, New York City. For the sake of brevity, however, we shall refer only to Class II-F since III and III-C were substituted for II-F at some stages of the period involved. Class II-B includes milk utilized in the manufacture of ice cream or frozen desserts but Classes II-F, III or III-C provide an exception by way of lower classification if the ice cream or frozen desserts are moved out of and remain outside New York City.

The petitioners argue (1) that the market administrator failed to *verify* their reports as required by the order because his auditors did not check shipment records at the Loft plant which would have disclosed a II-F instead of a II-B utilization, and (2) that the market administrator's refusal to reaudit the Loft plant records and to re-

classify the milk involved after notice of erroneous classification is not in accordance with law.

The material provisions of the order relied upon by the parties are as follows: (The references are to the order, as amended, effective April 1, 1942. The differences in these provisions from the provisions in effect prior to April 1, 1942, are immaterial.)

"**Sec. 927.3 Classification of milk.** (a) *Basis of classification.* \* \* \* In establishing the classification of any milk received at a plant from producers, the burden rests upon the handler who received the milk from producers to show that it should not be classified as Class I milk; likewise, having established the manufacture of cream, the burden rests upon such handler to show that the milk, the butterfat from which was manufactured into cream, should not be classified in Class II-A and that the skim milk, resulting from the manufacture of cream, should not be classified as Class V-A. \* \* \*

"(b) *Classes of utilization.* \* \* \* (2) Class II-A milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of cultured or flavored milk drinks containing less than 3.0 percent butterfat or in the form of cream, sweet or sour, unless such cream is established to have been subsequently so handled or marketed as to classify such milk in some other class.

"(3) Class II-B milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of plain condensed milk, or, except as set forth in subparagraphs (5), (6), and (7) of this paragraph, frozen desserts or homogenized mixtures; \* \* \*

"(7) Class II-F milk shall be all milk the butterfat from which leaves or is on hand at a plant in the form of frozen desserts or in the form of homogenized mixtures used in the frozen desserts, except as set forth in subparagraphs (5) and (6) of this paragraph, provided the frozen desserts in both instances were moved to a plant or delivered to a purchaser outside New York City and remained outside New York City; \* \* \*

"**Sec. 927.5 Reports of handlers.** (a) *Monthly reports.* On or before the 10th day of each month, each handler shall report to the market administrator, in the manner and on forms prescribed by the market administrator, with respect to milk received at each plant during a preceding month:

"(1) The total quantity of milk, with the average butterfat content thereof, received from producers, from other plants, from such handler's own farm, and from other handlers;

"(2) The total quantity of such milk and of each product of such milk moved out of, or on hand at, such plant within 8 days after the end of such month, the butterfat content of each product, and the destination of any milk which moved out of such plant;

"(3) If the classification of any milk is claimed by such handler on the basis of disposition in some other plant, the disposition of such milk at such other plant covered by statement signed by the operator of the other plant if not a handler; \* \* \*

"(c) *Verification of reports and payments.* The market administrator shall promptly verify all reports and payments of each handler by audit of such handler's records and of the records of any other handler or person upon whose disposition of milk such handler claims classification, and each such handler shall, during the usual hours of business, make available to the market administrator or his representative such records and facilities, of his own or of other persons, as will enable the market administrator to:

"(1) Verify the receipts and disposition of all milk required to be reported pursuant to this section, and, in case of errors or omissions, ascertain the correct figures; \* \* \*

"SEC. 927.7 *Payment to producers.* \* \* \* (j) *Adjustments of errors in payments.* Whenever verification by the market administrator of reports or payments of any handler discloses errors made in payments to or from the producer-settlement fund, the market administrator shall promptly bill such handler for any unpaid amount, and such handler shall, within 5 days, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is due from the market administrator to any handler the market administrator shall, within 5 days, make such payment to such handler. \* \* \*

#### FINDINGS OF FACT

1. The Northern Milk Corporation is a corporation organized under the laws of the State of New York and has its principal office at 235 High Street, Watertown, New York.

2. The Hygienic Dairy Company is a corporation under the laws of the State of New York and has its principal office at 235 High Street, Watertown, New York.

3. Irona Creameries, Inc., is a corporation under the laws of the State of New York and has its principal office at Champlain, New York. This petitioner is claiming as the successor to the interests of its predecessors.

4. Petitioners are handlers subject to the provisions of Order No. 27, as amended, regulating the handling of milk in the New York metropolitan marketing area.

5. During the period from May 1940 through June 1944, the petitioners sold cream to Hershey Farms, Inc. The cream was delivered to, and utilized by, Loft Candy Corporation of Long Island City, New York, in the manufacture of ice cream or frozen desserts. Some of the ice cream or frozen desserts manufactured was shipped by Loft out of the City of New York. It is the cream utilized in such ice cream or frozen desserts that is involved in this proceeding.

6. The petitioners each reported and claimed a II-B classification for the cream thus utilized by Loft Candy Corporation. Such claimed classification was, after audit, verified and allowed by the market administrator with the exception of the months of February and March, 1943. For those months the market administrator discovered in the course of his audit that, as to some of the milk, petitioners could have claimed a lower classification, namely, II-F, and he accordingly reclassified such milk in such lower classification.

7. As to other months, records showing the shipment of the ice cream out of New York City were not called to the attention of the market administrator's auditors until audits were being made of the month of July 1944 although shipment records were kept in the offices of Loft Candy Corporation.

8. In connection with the audit for months subsequent to June 1944, the market administrator reclassified the petitioners' milk which was manufactured into ice cream and which was shipped out of New York City in Class II-F although petitioners continued to claim the higher classification, II-B. The market administrator took this action as a result of the notice contained in a letter from Loft set out below in Finding of Fact 9.

9. On November 9, 1944, Loft wrote the market administrator as follows:

"Please be advised that the shipments of cream made to us by the Northern Milk Company, and the Hygienic Dairy Company in July 1944, one hundred thirty-three 40-qt. cans of 37% B. F., was utilized in Class 2F, in that this cream was used in the manufacture of ice-cream shipped by us to various localities outside of the City of New York and within the States of New York and New Jersey, and sold to the consumer at those points. This cream was originally classified in class 2B. Will you therefore reclassify it into class 2F, in order that a credit may be obtained from our supplier?

"Please be advised further that a portion of the ice-cream manufactured by us is being and has been for the past several years, shipped regularly by this company to points outside of the City of New York. The cream used in the manufacture of such ice-cream should likewise be reclassified into class 2F. Will you please make such determination?"

10. On November 16, 1944, the market administrator replied to Loft that any request for changes should be made by the handler.

11. On November 24, 1944, the Hygienic Dairy Company wrote the market administrator as follows:

"I am enclosing a copy of a letter we have written to Hershey Farms, Inc. this morning in reply to a letter from them about reclassification of July, 1944, cream sold to Loft Co., being used in New Jersey for ice cream purposes, from which letter they inferred that they have taken the matter up with your office where they received the advice that the request for such readit should come direct from the handler.

"We are pleased to make such request if it is in line with your thoughts on the handling of the situation, which we believe we have covered quite thoroughly in our letter to the customer."

12. The enclosed letter dated November 24, 1944, from Hygienic Dairy Company to Hershey Farms, Inc., is as follows:

"In answer to yours of 21st instant, addressed to each of our associated companies, The Northern Milk Corporation and the Hygienic Dairy Co., re cream sold you during the summer season direct to your customer, the Loft Co., who now evidently wishes to consider the New Jersey classification for 2-F cream for their ice cream production, such percentage of cream we shipped them as their records show as utilized in that class.

"We are sending a copy of this letter to the Federal Administrator's office with a letter to them that it meets with our approval if they wish to audit the Loft Co. and find such products from our shipments to them should go in 2-F instead of 2-B as originally classified. Whatever credit they allow us on this reclassification we in turn will be glad to credit your account for the adjustment with your customer, Lofts.



"All through this year, as well as former years, we have tried to give you the preference on any extra fluid cream we had to ship to New York; mainly because your classifications were either 2-A or 2-B cream and to keep in line with Department wishes and our own for having all of our product classified in the highest classification possible for metropolitan use has confirmed our desire to ship the 2-A and 2-B to you instead of some other customer who might want either 2-F or 2-D.

"As mentioned above, whatever re-adjustment is made in this reclassification the same credit will be given you for your customer's benefit; but I think you should bear in mind in the future that we are reluctant to ship cream in other than 2-A or 2-B, especially in the fall or winter season when we have plenty of opportunity to sell many times the amount we have available in those classes. Possibly part of this demand is borne out by the fact that we happen to be also Newark approved to the advantage of our New York customers who require that inspection also."

13. On April 17, 1945, Hygienic Dairy Company wrote the market administrator as follows:

"We are in receipt of a letter from Hershey Farms, Inc. to whom we furnish cream for their customer, Lofts of Long Island City, I believe. I understand that this cream was used for ice cream purposes either in New York or the northern part of New Jersey.

"Hershey Farms, Inc. write us that their customer Loft's insist that they are entitled to reclassification of the cream that they used during 1942, 1943 and 1944 for that manufactured in New York City and that manufactured outside into ice cream and requesting an audit by your office to determine what rebate we should receive in such classification and in turn pass along to them.

"We are enclosing a copy of the list of shipments on which they claim there might be credit coming to them from an audit by your office.

"They request this audit not only on the part of our company, the Hygienic Dairy Co., but also our associated milk company, the Northern Milk Corporation of Adams, New York, from whom part of their shipments went forward during 1942 and 1944.

"This is rather a surprise to us as our original and past understanding has been that their entire cream supply was used in their Long Island manufacturing ice cream plant for New York City use but now they seem to insist on the matter being submitted to your office for due consideration and decision. Kindly advise as to what might be your determination in this regard."

On April 24, 1945, the market administrator replied as follows:

"For the entire period involved both your company and the Northern Milk Company reported the cream shipped to the Loft Company as Class II-B ice cream. The reported use was verified by audits of the Loft Company operations for the period January 1942 through June 1944.

"After audit the II-F classification was permitted for 1,326-pounds of butterfat in February 1943, and 1,800 pounds of butterfat in March 1943."

14. On May 7, 1946, Loft wrote a Congressman, summarizing the operation of the pool, and stating:

"Prior to November 1944, the Market Administrator's auditors made periodic visits to our plant, and requested and examined our ice cream manufacturing records. They never asked to see any shipment records. We therefore never

displayed these records. These shipment records showed that some of the ice cream manufactured was shipped outside of New York City, and supported our requested 2F classification. However, on all visits made subsequent to November 1944, we have shown the auditor all shipment records as well as all manufacturing records \* \* \*.

"It was agreed between the handler and ourselves that we would draw the petition to the Secretary of Agriculture for a hearing to compel the New York Market Administrator to make the audit and adjustment, and that the handler would sign it. However, the handler has delayed doing so, stating he knows it will accomplish nothing.

"We would like the New York Marketing Administrator to audit our records as to shipment, and make a rebate for the period in question on the basis of this additional evidence, without the necessity of filing a petition with the Secretary of Agriculture for a hearing."

15. On June 18, 1946, Irona Creameries wrote the market administrator as follows:

"Some time ago the Loft Company requested that we ask your office to reclassify shipments of cream made to them during 1940 and 1941.

"According to our records these shipments were originally classified by us in class II-B, but the cream was actually used in other classes as shown by the attached statement.

"Will you kindly advise if reclassification can be made at this time?"

16. On June 27, 1947, the market administrator replied that since the classification reported was verified by audit findings of his office there could be no modification of that classification.

17. In May 1948, petitioners Hygienic Dairy Company and Northern Milk Corporation filed their petitions. In September 1948, petitioner Irona Creameries, Inc., filed its petition. Amended petitions were filed in July 1948 by Hygienic Dairy Company and the Northern Milk Corporation. Answers to the petitions were filed by the respondent.

### CONCLUSIONS

The first principal point of the petitioners is that the market administrator did not verify the petitioners' monthly reports in issue because his auditors did not check shipment records of the ice cream at the Loft plant. The petitioners argue that to verify the II-B utilization reported, audit of the shipping records was necessary and if this had been done, the ice cream would be seen to have been shipped outside the City of New York thus entitling it to a lower classification than II-B.

Handlers' reports under the order are a self-assessing proposition. Not only is this true but section 927.3 of the order places the burden upon the reporting handler to establish that the milk he receives from producers should not be classified in the highest-priced classification, Class I, and this section further defines the handler's burden by providing that a handler, having shown the manufacture of cream, has the

burden of establishing that the cream should not be classified II-A. While, of course, verification of handlers' reports by the market administrator is prescribed, the primary reason for such verification is to assure that the handler does not report and pay for milk on the basis of *lower* classifications than the correct classifications.

In this case, the reporting handler claimed Class II-B for the ice cream. Class II-B is the general or "basic" classification for ice cream shipped out of the city. The shipping records were not brought to the attention of the auditors in connection with the audits for the months involved. We do not believe that the market administrator failed in his duty of certification because his auditors at the time of the audits a number of years ago did not seek out the shipment records of the ice cream. The Loft plant was an ice cream manufacturing plant. The burden was upon the petitioners to see that the shipment records were examined if they wished a classification dependent upon such records. Moreover, the petitioners are hardly in a position to assert *now* for their advantage that the market administrator did not comply with the order in allowing the classification they claimed.

The petitioners cite instances such as the extensive audit made for February and March, 1943, when shipping documents were examined and the destination of ice cream noted with consequent reduction in the classification. They argue that this should have been done for every month and they contend that the market administrator's office has required examination of shipping documents for verification of utilization. We do not believe that because the auditing procedures may have become more complete and detailed in recent years any prior auditing becomes retroactively illegal and faulty. We do not believe either that, because at other times or under other circumstances it was thought necessary to check shipping documents in verification of a report, the failure to do so in this case constitutes a defective verification which petitioners can now set aside. The extent of the auditing necessary to verify reports is largely a matter of discretion with the market administrator and we cannot say for the advantage of the petitioners here that the market administrator, as a matter of law, should have investigated further and given the petitioners a lower classification than they reported. We have the same views concerning a period of several months, October 1940-January 1941, when no audit was conducted because of insufficient personnel.

Petitioners invoke section 927.6 (b) of the order which provides that:

"The market administrator shall, on or before the 14th day of each month, audit for mathematical correctness and obvious errors the report submitted for the preceding month by each handler. \* \* \*"

This can refer only to an examination of the report and not to an audit of the books and records of the various handlers and their customers. Only four days are allowed for this examination after the filing of the report.

The petitioners further contend that it was the duty of the market administrator to reaudit and reclassify upon their request. They refer to section 927.7 (k) of the order which is as follows:

*"(k) Adjustments of errors in payments.* Whenever verification by the market administrator of reports or payments of any handler discloses errors made in payments to or from the producer settlement fund, the market administrator shall promptly bill such handler for any unpaid amount, and such handler shall, within 5 days, make payment to the market administrator of the amount so billed. Whenever verification discloses that payment is due from the market administrator to any handler the market administrator shall, within 5 days, make such payment to such handler. Whenever verification by the market administrator of the payment to any producer for milk delivered to any handler discloses payment to such producer of less than is required by this section, the handler shall make up such payment to the producer not later than the time of making payment next following such disclosure."

The market administrator's verifications of the reports did not disclose that errors had been made or that payment was due to the petitioners and, for the reasons given above, we believe that the verification was adequate.

The remaining issue is whether the market administrator should have conducted a reaudit when asked to do so. The correspondence set out in the Findings of Fact is interesting. It is obvious that Loft rather than the petitioners is the real party in interest although the petitioners finally filed the petitions at Loft's urging. It is apparent too that the II-B classifications were not reported in error. The petitioners sold the cream for Class II-A and II-B purposes and were not interested in selling it for any lower-classified uses. The evidence indicates that petitioners, for purposes of their own, really wanted a II-B classification and would not have sold the cream to Hershey for Loft if they had thought it would get a lower classification. Even after petitioners learned from the market administrator's adjustments in February and March, 1943, that all the cream was not actually being used in II-B, they continued to claim II-B classification for it. They wished it to have that classification. They knew the provisions of the order and could easily have known the disposition of the ice cream had they been interested in that information. Not until long after the shipments involved, and then at the insistence of Loft, did the petitioners file their petitions requesting reclassification. Under the circumstances, we do not think the market administrator acted arbitrarily or unlawfully in refusing to incur the expense necessary to a reaudit to determine, not only to what points

Loft shipped the ice cream, but to determine that it never reentered New York City.

Petitioners refer to several instances in which the market administrator reclassified milk where, upon investigation, he found the original classification to be incorrect. These are all cases in which the handler, either wilfully or inadvertently, failed to report correctly the utilization of his milk but claimed a *lower* classification than that to which he was lawfully entitled. He was not allowed to retain the profit resulting from his false reporting. These instances are not precedents for the situation here where the petitioners reported classifications, apparently deliberately, which a long time later they claim were higher than the actual classification of the utilization.

We are of the opinion that the action of the market administrator in refusing to reaudit and reclassify the milk in question was not contrary to law.

#### ORDER

The relief requested by petitioners is denied and the petitions are dismissed.

#### SUPPLEMENTAL ORDER JUNE 16, 1950

The decision and order entered in this proceeding on June 14, 1950, is corrected as follows:

(1) On page 694, line 33, delete "of" and substitute the following for the sentence beginning on that line:

"For the sake of brevity, however, we shall refer only to Class II-F, it being understood that Class III or III-C is meant for the times when such designation rather than II-F is pertinent."

(2) Insert the following line after the word "ice" on line 7, page 700.

"cream with exceptions carved from this general classification for ice."

(No. 2469)

*In re* MARKET AGENCIES AT UNION STOCK YARDS, DENVER, COLORADO.  
P&S Doc. No. 435. Decided June 12, 1950.

#### Increase in Rates and Charges

Inasmuch as the parties are agreed and no objection has been filed, respondents' petition is granted and respondents are authorized to file a new and higher rate schedule and are permitted to use the proposed form of the report attached to and filed with the amended petition.

*Mr. John J. Murray* for Livestock Branch, Production and Marketing Administration. *Mr. Lynn S. Kemper*, of Denver, Colorado, for respondents.

*Decision by Thomas J. Flavin, Judicial Officer*

#### SUPPLEMENTAL ORDER

The respondents are now operating under an order issued on May 23, 1949 (8 A. D. 532) which continued in effect the provisions of an order dated May 24, 1948 (7 A. D. 391). The order of May 24, 1948, modified the provisions of a previous order dated August 20, 1946 (5 A. D. 600) as amended.

On April 28, 1950, respondents filed a Petition for Modification of Rates and Charges requesting authority to file and establish as of July 1, 1950, a new schedule of rates and definitions set forth in a proposed Tariff No. 13 attached to and made a part of the petition. The petition also requests that the authorization continue in effect until and including September 30, 1951, and that respondents be permitted to submit Profit and Loss Statements, Statements of Volume, and Reports of Salaries Paid on an annual basis in lieu of the requirements of the current order. On May 26, 1950, respondents filed an amended Petition for Modification of Rates and Charges requesting that they be authorized to submit and file as their tariff another proposed Tariff No. 13 attached thereto and made a part thereof in lieu of the proposed Tariff No. 13 attached to and made a part of the petition filed on April 28, 1950. The amended petition also requests that, in lieu of certain reports with respect to revenues and expenses heretofore required by the current and previous orders in this proceeding, respondents be authorized to furnish, annually, data provided for by a proposed form of report entitled "Annual Report" attached to and filed with the amended petition.

Notice of the Petition for Modification of Rates and Charges filed on April 28, 1950, was published in the Federal Register on May 16, 1950. This notice set out the entire Proposed Tariff No. 13. No objection to the action petitioned for was filed with the Hearing Clerk. The rates sought by the amended petition will not produce higher average per head revenues by species than the rates requested in the original petition, notice of which was published on May 16, 1950.

On June 2, 1950, the Livestock Branch filed an answer recommending that the petition as amended be granted.

Inasmuch as the parties are agreed and no objection has been filed, the petition as amended is granted. The respondents shall furnish, annually, the data provided for by the proposed form of report attached to and filed with the amended petition. The respondents are authorized to file a new Tariff No. 13 which shall read as follows:

## DENVER LIVE STOCK EXCHANGE

## Tariff No. 13

## ARTICLE 1—DEFINITIONS

**CATTLE** are animals of the bovine species weighed in drafts, the average weight of the animals in which is over 400 pounds.

**CALVES** are animals of the bovine species weighed in drafts, the average weight of the animals in which is 400 pounds or under.

**BULLS** are uncastrated male animals of the bovine species (except purebred or registered), weighed in drafts, the average weight of the animals in which is 600 pounds or over.

**HOGS** are all swine, irrespective of weight.

**SHEEP** are all animals of the ovine species and, for purposes of assessing charges in this tariff, include goats.

A **CONSIGNMENT** for the purpose of assessing selling charges is all the livestock of one species (cattle, calves and bulls to be considered as separate species) belonging to one owner and delivered to one market agency to be offered for sale at one time and sold by it.

A **PURCHASE ORDER** for the purpose of assessing buying charges is all the livestock of one species (cattle, calves and bulls to be considered as separate species) bought at any time but shipped to or delivered to one person on one market day.

A **DRAFT** is all the animals in one consignment weighed as a single sales classification.

A **PERSON** is an individual, a partnership, a corporation and/or an association of any such acting as a unit.

**NOTE:** When single-deck cars are furnished in lieu of double-deck car or cars ordered, each two single-deck cars shall be considered to be a double-deck car.

## ARTICLE 2—SELLING, RESELLING AND BUYING CHARGES

## SECTION A

Cattle:	<i>Per head</i>
Consignments of one head and one head only-----	\$1.20
Consignments of more than one head:	
First 5 head in each consignment-----	1.00
Next 10 head in each consignment-----	.95
Each head over 15 in each consignment-----	.90

**NOTE:** Maximum charges on a consignment of cattle arriving by rail shall not exceed an amount equal to \$30.00 multiplied by the number of cars in which the consignment arrives at the market.

## SECTION B

Calves:	<i>Per head</i>
Consignments of one head and one head only-----	\$0.85
Consignments of more than one head:	
First 5 head in each consignment-----	.55
Next 10 head in each consignment-----	.50
Each head over 15 in each consignment-----	.40

**NOTE:** Maximum charges on a consignment of calves arriving by rail shall not exceed an amount equal to \$30.00 multiplied by the number of single-deck cars in which the consignment arrives plus \$40.00 multiplied by the number of double-deck cars in which the consignment arrives at the market.

**SECTION C**

<b>Bulls:</b>	<i>Per head</i>
Sold for slaughter or as feeders, irrespective of the mode of arrival or departure.....	<b>\$1. 50</b>

**SECTION D**

<b>Hogs—Irrespective of the mode of arrival or departure:</b>	<i>Per head</i>
Consignments of one head and one head only.....	<b>\$0. 50</b>
Consignments of more than one head:	
First 10 head in each consignment.....	<b>. 40</b>
Next 15 head in each consignment.....	<b>. 85</b>
Each head over 25 in each consignment.....	<b>. 25</b>

**SECTION E**

<b>Sheep:</b>	<i>Per head</i>
Consignments of one head and one head only.....	<b>\$0. 50</b>
Consignments of more than one head:	
First 10 head in each 250 head in each consignment.....	<b>. 35</b>
Next 50 head in each 250 head in each consignment.....	<b>. 19</b>
Next 60 head in each 250 head in each consignment.....	<b>. 10</b>
Next 130 head in each 250 head in each consignment.....	<b>. 08</b>

**NOTE:** Maximum charges on any consignment of sheep arriving by rail shall not exceed an amount equal to \$20.00 multiplied by the number of single-deck cars plus \$30.00 multiplied by the number of double-deck cars in which the consignment arrived at the market.

**SECTION F**

<b>Dairy and Breeding Animals:</b>	<i>Per head</i>
Purebred or registered bulls.....	<b>\$7. 50</b>
Purebred or registered cows or heifers.....	<b>5. 00</b>
Milk cows with or without calf at side.....	<b>1. 50</b>
Rams for breeding purposes.....	<b>1. 00</b>

**SECTION G**

On all carloads of livestock that are put through the auction sales ring during Stock Show Week, one and only one regular selling commission shall be charged by the market agency, provided the carload is of the same ownership and same identity.

**SECTION H**

Any sale of livestock made at the auction sales ring during Stock Show Week shall be contingent and not final until the buyer of said livestock has made satisfactory settlement or arrangements with the market agency handling the said livestock. But in the event that the market agency has issued release or releases to the buyer of the livestock then all liability for payment of said livestock to the owner or owners must be assumed and made by the market agency.

**ARTICLE 3—EXTRA SERVICE CHARGES**

The following Extra Service Charges are applicable to all species:

**SECTION A**

When a buyer who has purchased livestock from a commission firm requests any service and/or assistance, and/or elects to have the firm place billing order



or orders and service is actually rendered, one-fourth of the regular buying commission shall be charged for such service. This service charge shall not be assessed to purchasers of registered or purebred cattle bought for breeding purposes during the week of the Stock Show, or when regular buying commission is charged.

#### SECTION B

When livestock bought from other firms by the purchaser himself is paid for and/or picked up and/or billed out or any other assistance is rendered in the purchase of the stock, one-half the regular buying commission shall be charged to the buyer.

#### SECTION C

For each additional weight draft over 3, on account of sales classification (not to exceed \$3.00 on any one owner) : \$0.25.

No extra draft charges shall be made on a Purchase Order.

For each additional check, each additional account of sales, each proceeds deposited or bank credit, over 2: \$0.05.

#### SECTION D

When buys are made to complete a Purchase Order from more than two agencies and/or dealers, a charge of 50¢ shall be made for each additional agency and/or dealer in excess of two.

#### DEDUCTIONS MADE BY SELLING AGENCIES AT DENVER FOR THE ACCOUNT OF OTHERS

The charges set forth below are for the accommodation of the shippers, their organizations and State Authorities and are not collected at the direction of The Denver Live Stock Exchange or at the behest of or by the United States Department of Agriculture.

(a) For the Colorado-Nebraska Lamb Feeders Association, for the Colorado Wool Growers Association and for the Colorado Cattlemen's Association, such assessments on livestock consignments of their members may be levied by the respective bodies from time to time, the names of said members to be filed with the respective firms. Such collections, however, to be optional with each of said member shippers.

(b) For the Colorado Board of Livestock Inspection Commissioners, 6 cents per head on all cattle originating in said state when such inspection fee has not been paid at loading point, for the purpose of providing proper brand inspection on such shipments.

(c) For the National Live Stock and Meat Board, 25 cents per straight cars (single ownership on all consignments) of cattle and hogs, and 75 cents on all consignments of sheep to be sold on this market. Such collection, however, to be optional with shippers. Commensurate charges for all other modes of arrival.

(d) For Yard insurance coverage on fire and mixing caused by fire on all livestock while in the Yards, 10 cents per carload, commensurate charges on all other modes of arrival.

(e) There shall be collected in addition to the regular selling commission on all livestock passing through the sales ring of the Denver Union Stock Yards, an auctioneer fee as hereinafter provided:

#### DURING STOCK SHOW WEEK

Cattle or calves : \$1.50 for each individual head.

Cattle or calves : \$5.00 for each carload.

Lots of three head or more sold together to be assessed at the carload rate.

Fat wethers and barrows: \$0.50 per head.

More than six head of either hogs or sheep to be assessed at the carload rate of \$3.00 provided they are sold as a group.

4-H CLUB SALES AND FUTURE FARMERS OF AMERICA SALES AT AUCTION OTHER THAN  
DURING STOCK SHOW WEEK

Cattle or calves: \$1.00 for each individual head.

Cattle or calves: \$5.00 when sold in groups of five or more.

The schedule of rates attached to the original petition filed on April 28, 1950, was set out in full in the Federal Register and all interested parties were afforded an opportunity to be heard in the matter. No protest was received in connection with the action petitioned for. The schedule authorized by this order will produce the same or lower per head revenues by species. In view of the foregoing, it is found that notice and public procedure on this order are unnecessary.

The respondents who must prepare for and be ready to comply with the provisions of this order on its effective date wish to have it become effective on July 1, 1950. All interested persons have been afforded a period of 15 days during which to be heard on the original petition for rates which would produce the same or higher average per head revenues by species. The Packers and Stockyards Act provides that no order of this nature shall become effective in less than five days after the date thereof. Any undue delay in making this order effective may adversely affect marketing conditions. Accordingly, good cause is found for making this order effective in less than 30 days.

This order shall become effective on July 1, 1950, and continue in effect to and including September 30, 1950, unless changed by further order before that date.

Copies hereof shall be served upon the parties by registered mail or in person.

(No. 2470)

J. B. WILLOUGHBY v. PRODUCERS LIVESTOCK MARKETING ASSOCIATION.  
P&S Doc. No. 1859. Decided June 12, 1950.

**Dismissal—Reparation Complaint**

Complaint for reparation dismissed because of complainant's failure to carry burden of proof as to the weight of an animal shipped by plaintiff from Iowa to Omaha for sale by respondent, a commission merchant engaged in business at the Union Stock Yards, Omaha, Nebraska.\*

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

*Mr. Boyd M. Cambridge*, of Jones, Cambridge & Carl, Atlantic, Iowa, for complainant. *Mr. J. J. Vinardi*, of Gross, Welch, Vinardi & Kauffman, Omaha, Nebraska, for respondent. *Mr. Harry Wales*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Packers and Stockyards Act, 1921, as amended. The complainant claims the sum of \$93.00 representing the difference between the amount received by him from the sale of a Black Angus bull by the respondent for his account and the amount he contends he should have received. The complainant shipped the bull to Omaha from his farm in Iowa. He received the amount of \$302.94 representing the net proceeds from the sale of a bull weighing 1,480 pounds at \$21.00 a hundred pounds. The complainant estimates that his bull weighed at least 1,800 pounds and should have brought \$22.00 a hundred pounds instead of \$21.00.

A hearing was held in Omaha, Nebraska, on February 16, 1950.

### FINDINGS OF FACT

1. The respondent, Producers Livestock Marketing Association, is a commission merchant engaged in business at the Union Stock Yards, Omaha, Nebraska.

2. The complainant, an individual farmer residing near Lewis, Iowa, shipped a Black Angus bull to the respondent at Omaha, Nebraska, on or about December 13, 1948.

3. The bull was received by the respondent on or about December 14, 1948, and was sold on behalf of the complainant at a price of \$21.00 a hundred pounds. The weight of the bull sold by the respondent as shown by the stockyard scales was 1,480 pounds and the total sales price was \$310.80.

4. The respondent deducted from the proceeds the amount necessary to pay for trucking the bull from the complainant's farm in Iowa to Omaha and for its own and other services at the stockyards, and remitted the net proceeds of \$302.94 to the complainant.

5. Complaint was made to the Secretary of Agriculture within ninety days after the date of the transaction complained of.

### CONCLUSIONS

It is the belief of the complainant that the Black Angus bull which he shipped to the respondent weighed at least 1,800 pounds and was in such good condition that it should have sold for \$22.00 a hundred pounds instead of \$21.00 a hundred pounds. However, to support this belief he was able to offer in evidence only his own estimate as

to its weight and the estimates of his neighbors. On the other hand, the respondent's evidence showed that a procedure was followed in handling the bull which made it extremely unlikely, if not impossible, that there could have been a mixup so that another bull was sold as the complainant's bull. The fact that the bull actually weighed only 1,480 pounds is established beyond dispute by its actually being weighed on the scales at the Union Stock Yards Company.

The burden of proof in a situation of this kind is, of course, on the complainant. He must prove his case by a preponderance of the evidence. That he has failed to do.

### ORDER

The complaint is dismissed.

Copies hereof shall be served on the parties by registered mail or in person.

(No. 2471)

*In re* WILLIAM FOLEY, RAY L. JACKSON AND FRANK STANDISH, D. B. A.  
FRANK STANDISH COMPANY. P&S Doc. No. 1892. Decided June 13, 1950.

### Suspension of Registration—Violation of Act—Cease and Desist

Where respondents admitted the violations of the act which the order of inquiry alleged as having been committed by one respondent and the other two respondents did not participate in, having knowledge of, or profit from the violations, the registration of the three respondents as a partnership is suspended for a period of ten months and respondents are ordered to cease and desist, but the suspension is not to apply to or have any effect on a new registration of the two respondents as partners who did not participate in, have knowledge of, or profit from the violations engaged in by the one respondent.\*

*Mr. Elmer J. Scott* for complainant. *Messrs. William Foley, Ray L. Jackson, and Frank Standish*, of Kansas City, Missouri, *pro se*.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended (7 U. S. C. 181 *et seq.*), hereinafter referred to as the act. The order of inquiry and notice of hearing, filed February 1, 1950, alleges that respondents wilfully violated

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

several different provisions of the act and of the regulations thereunder.

Respondents Jackson and Standish each filed answers on February 9, 1950, in which they denied any part in, or knowledge of the acts which the order of inquiry alleges were committed by Foley. On the same day, respondent Foley filed an answer in which he admitted some of the allegations in the order of inquiry and stated that neither of his partners nor any of their employees had any knowledge of the acts complained of. On May 8, 1950, respondents Jackson and Standish filed supplemental answers and on June 1, 1950, respondent Foley filed a supplemental answer. In their supplemental answers they each admitted the facts alleged in the order of inquiry, waived oral hearing, and consented to the entry of an appropriate order without further notice. Although Jackson and Standish admitted the facts alleged and are apparently willing to accept responsibility for the acts of their partner Foley, they reiterated their denial of any personal knowledge of the actions of Foley which are the basis for the order of inquiry.

After the order of inquiry was filed, Foley was expelled from the Kansas City Livestock Exchange and withdrew as a partner from the respondent firm. Respondents Jackson and Standish, as partners, then reregistered under the old firm name and are now operating as registrants. The Livestock Branch does not contend that respondents Jackson and Standish had knowledge of the violations of the act committed by Foley nor that they profited personally therefrom.

#### FINDINGS OF FACT

1. At all times mentioned herein William Foley, Ray L. Jackson and Frank Standish were partners doing business as Frank Standish Company and were registered with the Secretary of Agriculture as a market agency pursuant to the act to buy and sell livestock on a commission basis at the Kansas City Stock Yards, Kansas City, Missouri.

2. The Kansas City Stock Yards, Kansas City, Missouri, hereinafter referred to as the stockyards, at all times mentioned herein was a posted stockyard subject to the provisions of the act.

3. At all times mentioned herein respondent William Foley was a cattle salesman for Frank Standish Company and Ray V. Hartman was registered with the Secretary of Agriculture pursuant to the act as a dealer to buy and sell cattle for his own account at the stockyards.

4. Since on or about June 1, 1945, until January 13, 1950, pursuant to an arrangement between Ray V. Hartman and respondent William Foley, Ray V. Hartman planted cattle purchased by him with the Frank Standish Company at the stockyards for resale. Respondent

William Foley sold the cattle so planted in competition with shippers' livestock and for special treatment and attention accorded the sale of Hartman's cattle and in pursuance of their arrangement, respondent William Foley collected and received weekly from the said Hartman sums of money ranging up to \$100.00 per week, the last such payment having been made on or about January 12, 1950, and being in the sum of \$85.00 or more.

5. (a) On or about January 13, 1950, respondent William Foley received the sum of \$100.00, more or less, from Ray V. Hartman to transmit to certain weighmasters at the stockyards which sum of money was compensation to the weighmasters for recording weights on scale tickets showing the weight of cattle sold for Ray V. Hartman at a weight greater than the true and correct weight thereof and showing the weight of cattle bought by Ray V. Hartman at less than the true and correct weight thereof, and respondent William Foley delivered the money to weighmaster William E. Miller for distribution among the weighmasters involved. The said scale tickets were made a part of the records and memoranda kept by the operator of the stockyards.

(b) At divers other times during the period from July 1, 1949, to January 8, 1950, respondent William Foley received various sums of money from Ray V. Hartman to transmit to certain weighmasters at the stockyards, which sums of money were compensation to the weighmasters for recording weights on scale tickets showing the weight of cattle sold for Ray V. Hartman at a weight greater than the true and correct weight thereof and showing the weight of cattle bought by Ray V. Hartman at less than the true and correct weight thereof, and the said scale tickets were made a part of the records and memoranda kept by the operator of the stockyards.

6. On or about January 17, 1950, respondent William Foley during an interview with C. L. Richard and Charles C. Sercer, authorized agents of the Secretary of Agriculture, in response to questions from such agents wilfully gave false information to said agents concerning the receipt of money from dealers at the stockyards for weighers and for special treatment accorded dealers' livestock.

#### CONCLUSIONS

The respondents were registered as a market agency to sell livestock on a commission basis at the stockyards. In selling shippers' livestock they acted as agent for the shippers to whom they owed the duty of undivided loyalty. They were required at all times to be alert to promote their principals' interest and to permit no conflicting interest to intervene in the performance of their duties as an agent. The failure to fulfill that responsibility of an agent in

the manner which the facts set out in paragraphs 3, 4 and 5 disclose, was unfair, unjustly discriminatory and deceptive in violation of section 312 (a) of the act and was a failure to render reasonable selling services in violation of section 304 of the act.

Under section 306 (f) of the act, the respondents are only entitled to charge and collect the commissions set out in their tariff on file with the Secretary of Agriculture. The receiving of payments by Foley from Hartman for special treatment and attention accorded the sale of Hartman's livestock, as set out in finding of fact No. 4, was also in violation of section 306 (f) of the act.

The result of the arrangement under which a dealer paid certain weighmasters at the stockyards for favorable but false weights, as set out in finding of fact No. 5, was that false entries were made in the accounts and records of the operator of the stockyards, in violation of section 10 of the so-called Federal Trade Commission Act which section is incorporated in and made a part of the Packers and Stockyards Act by section 402 of the latter act. Respondent Foley is responsible in part for the violations of that section because of his participation in the arrangement.

The making of false statements to agents of the Secretary during the course of an investigation was a violation of section 201.88 of the regulations. The successful enforcement of a regulatory statute depends in a large measure on the reliability of the information furnished by those subject to the provisions of the statute. The giving of false information, either orally or in writing, tends to conceal violations of the act and to mislead enforcement officials so that the enforcement of the act is seriously hampered and frustrated. Congress apparently recognized that fact because the most severe criminal penalty for which it made provision in the act applies to the keeping of false records and the making of false reports.

The nature of the violations indicates that they were wilful. The violations are very serious and the registration of respondents Foley, Jackson and Standish, doing business as Frank Standish Company, should be suspended for a period of ten months. Inasmuch as respondents Jackson and Standish did not participate in, have any knowledge of, or profit from the violations engaged in by Foley, the suspension here ordered should not affect their new registration as partners. The respondents should also be ordered to cease and desist from continuing to violate the act and the regulations.

#### ORDER

The respondents shall cease and desist from:

(1) Engaging in unfair and deceptive practices and devices in violation of section 312 (a) of the act,

**(3) Charging and collecting any rates other than those set out in their tariff on file with the Secretary of Agriculture,**

**(8) Failing to render reasonable selling services in violation of section 304 of the act,**

**(4) Causing false entries to be made in the accounts and records of stockyard owners and registrants under the act, and**

**(5) Giving false information concerning their operations at the stockyards to representatives of the Secretary of Agriculture charged with responsibility for enforcement of the act.**

The registration of William Foley, Ray L. Jackson and Frank Standish, doing business as Frank Standish Company is suspended for a period of ten months from the effective date hereof. This suspension shall not apply to or have any effect on the new registration of Ray L. Jackson and Frank Standish as partners, now doing business as Frank Standish Company, inasmuch as they did not participate in, have knowledge of, or profit from the violations engaged in by Foley.

A copy of this order shall be served upon each respondent and it shall become effective five days after service.

**(No. 2472)**

**THE CLEVELAND VEGETABLE MARKET CO. v. SIMON SIEGEL CO. AND/OR AL KAISER & BROS., INC. PACA Doc. No. 4911. Decided June 2, 1950.**

**Failure to Pay Deficit**

Where the evidence shows the parties entered into an agreement for the shipment of a carload of lettuce for sale by complainant on a consignment basis for the account of respondent, complainant received and sold the lettuce incurring a deficit and respondent refused to reimburse complainant for the loss, held, respondent's failure to pay the deficit is a violation of section 2 of the act for which reparation, with interest, should be awarded complainant.\*

**Consignment Sale—Consignee Not Guarantor of Success of Undertaking**

A consignee of a shipment for sale on a commission basis, held, not to be a guarantor of the success of the undertaking where the consignor issued instructions not to break the load unless the consignee believed the contents could be sold for more than freight and other charges.\*

**Principal and Agent—Effect of Violation of Principal's Instructions by Agent**

Where the principal is disclosed, the fact that the agent may have violated the principal's instructions does not release the principal from its obligations under a contract with a third person.\*

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.



*Mr. Fred Stue, of Cleveland, Ohio, for complainant. Messrs. Gellert & Gellert, of Chicago, Illinois, for respondents. Mrs. Hene M. Origler, Presiding Officer.*

*Decision by Thomas J. Flavin, Judicial Officer*

#### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C., 1946 ed., 499a *et seq.*). Complainant seeks to recover a deficit which, it is alleged was incurred in connection with its sale on a commission basis, and for the account of respondent Al Kaiser & Bros., Inc., of one carload of lettuce. The Simon Siegel Company negotiated the agreement in controversy and has been joined by complainant as a co-respondent.

A copy of the report of investigation prepared by the Regulatory Division was served by registered mail upon complainant on February 23, 1948. Copies of the report of investigation and of the formal complaint were served by registered mail upon each respondent on February 21, 1948. Each respondent filed an answer to the complaint denying liability upon the grounds, in effect, that complainant had proceeded with sales of the lettuce contrary to instructions not to break the car unless he was certain the contents would sell for more than freight and other charges, and that complainant did not dispose of the lettuce with due diligence. The amount involved is less than \$500. The case, therefore, is handled in accordance with the shortened method of procedure provided by the rules of practice. Complainant filed an opening statement of facts, each respondent filed an answering statement of facts, and complainant filed a reply to the answering statements of facts.

#### FINDINGS OF FACT

1. Complainant, The Cleveland Vegetable Market Co., is a corporation whose post office address is Unit No. 6, Northern Ohio Food Terminal, Cleveland 15, Ohio.

2. Respondent Simon Siegel Co. is a corporation whose post office address is 216 South Water Market, Chicago 8, Illinois. At the time of the transaction involved herein this respondent was licensed under the act.

3. Respondent Al Kaiser & Bros., Inc., is a corporation whose post office address is 216 South Water Market, Chicago 8, Illinois. At the time of the transaction involved herein this respondent was licensed under the act.

4. On or about August 5, 1946, in the course of interstate commerce, complainant and respondent Kaiser entered into a contract which provided that complainant would sell, on consignment for the account

of respondent Kaiser, the lettuce then contained in car NWX 4543. The contract was negotiated by respondent Siegel.

5. Car NWX 4543, which contained 318 crates of Watex brand lettuce, was shipped from Watsonville, California, on July 25, 1946, to respondent Kaiser at Chicago, Illinois. A restricted Federal inspection made at Chicago, Illinois, on August 5, 1946, revealed the lettuce to be in the following condition:

"... 20 to 40 average approx. 80% heads affected with decay bacterial soft rot mostly affecting 2 to 4 head leaves few affecting entire head. In addition 10 to 20% average 17% damaged by tipburn remainder heads generally fresh and crisp. . . ."

The inspector did not attempt to determine the grade of the lettuce because of the high percentage of condition factors.

6. Respondent Kaiser knew of the condition of the lettuce in Chicago, as revealed by the Federal inspection report referred to in Finding 5. On or about August 5, respondent Kaiser diverted the lettuce in question to complainant at Cleveland, Ohio, where it arrived on August 7, 1946. Complainant did not learn of the condition of the lettuce until the shipment reached Cleveland.

7. At the request of complainant, a Federal inspection was made of the partly unloaded shipment of lettuce at Cleveland, Ohio. The following information is contained in the certificate, dated August 7, 1946, 3:15 p. m., evidencing this restricted inspection:

"... Grade defects range from 5 to 25%, average 12%, . . . . Ranging from 10 to 30%, average approximately 15% Tipburn, most of which is slight. From 10 to 30%, average 20% Bacterial Soft Rot in various stages, mostly early to fairly well advanced, affecting compact portions of heads."

The grade was certified as "Fails to grade U. S. No. 1 account defects in excess of the tolerance."

8. Sales of the lettuce in question were made by complainant during the period August 7 through August 15, 1946. Of the 318 crates of lettuce contained in the car, 208 were sold for gross proceeds of \$458.25. Thirteen crates were left in the car, and 97 crates were dumped.

9. The following charges were paid by complainant in connection with the lettuce in question: Dump certificate \$2.50, Government inspection \$5, Cartage \$21.35, Freight \$561.15, and Demurrage \$2.27. Adding complainant's commission of \$45.83 to these charges brings the total charges against the shipment to \$638.10. Applying the gross proceeds of sale amounting to \$458.25 leaves a deficit of \$179.85. Although requested to do so, respondents have failed and refused to reimburse complainant for this deficit or any part thereof.

10. The informal complaint was filed on November 29, 1946, which was within 9 months after the cause of action accrued.

### CONCLUSIONS

It is undisputed that Mark Zackler, a representative of respondent Simon Siegel Company (hereinafter referred to as Siegel), negotiated the contract involved herein. Also, it is clear that the agreement entered into by complainant and respondent Al Kaiser & Bros., Inc. (hereinafter referred to as "Kaiser"), provided that complainant was to sell a designated carload of lettuce on a commission basis for the account of Kaiser. The only seriously controverted issue involves certain instructions which Kaiser alleges it gave to Zackler to be relayed to complainant. These alleged instructions are to the effect that, if complainant did not believe the lettuce could be sold for enough to cover freight and all other charges, complainant was not to break the load but was to abandon the lettuce to the railroad. Respondents both take the position that complainant ignored these instructions and consequently should bear the loss incurred. Complainant denies ever having received the instructions.

Mark Zackler is now deceased. According to a report dated January 21, 1948, contained in the report of investigation, Zackler admitted to the investigator having received the instructions from Kaiser. Zackler stated to the investigator that on the day following the date of the agreement he, Zackler, talked over the telephone with a representative of complainant firm on other matters, and at that time he mentioned Kaiser's instructions. In a sworn answering statement of facts, Simon Siegel, president of the brokerage company, states that he had personal knowledge of the transaction in question and that such instructions were relayed to complainant by Mark Zackler. The alleged instructions in controversy do not appear in the telegraphic confirmation of the agreement sent by the brokerage company to complainant, nor do they appear in any other written documents pertaining to the transaction. The evidence shows that Kaiser directed the broker to issue the instructions to complainant, but we think respondents have failed to show by a preponderance of the evidence that the instructions in question were relayed to complainant.

An instruction to abandon a shipment not considered to be worth freight charges appears to be in the nature of an admonition. While it is not unusual for us to hear that such instructions were given, the consignee of a shipment on consignment would normally pursue such course where it appeared that the proceeds of sale would be less than freight charges. But the issuance of such instructions does not make the consignee personally liable for a deficit incurred in connection with the shipment. We have consistently held that a commission merchant does not insure the success of an undertaking or guarantee

against mistakes or errors of judgment. *Samuel George v. Showker Bros.*, 8 A. D. 702, 708, citing *Carmichael v. Lavengood*, 112 Ind. App. 144, 44 N. E. 2d 177 (1942); *Rice v. Longfellow Brothers Company*, 82 Minn. 154, 84 N. W. 660 (1901); *Milton Smith v. Fidelity & Columbia Trust Company*, 227 Ky. 120, 12 S. W. 2d 276, 62 A. L. R. 1357 (1928). In our opinion a consignee is not liable, in the absence of negligence, for the deficit incurred on a consignment shipment unless there is a clear understanding or agreement to that effect. We find no such understanding or agreement here.

With respect to the performance by complainant of its obligations under the contract, it is not shown that complainant failed to exercise the required degree of care, or that the sales were not made to the best possible advantage. Whereas the deficit incurred may have resulted from the exercise of poor judgment on complainant's part, it would seem that complainant's action in proceeding with the sale of the lettuce could have been no greater error of judgment than was Kaiser's election to divert the shipment to complainant. Particularly is this true when Kaiser had knowledge of the high percentage of defects and decay in Chicago, and the restricted Chicago inspection report indicated the lettuce to be in even worse condition than did the restricted Cleveland inspection report. The complaint in *Irving J. Okum v. N. S. Toledo Company*, 8 A. D. 261, involved a similar consignment of lettuce with resultant loss. In that case we questioned whether the consignor, who did not consider that abandonment was justified at Pittsburgh, should be allowed to complain that the consignee did not think the lettuce should be abandoned in New York. At one stage of the present proceeding, respondent Siegel seems to have conceded that complainant was entitled to reimbursement for the deficit. This appears from a letter addressed by that company to complainant on August 23, 1946, with reference to an account sales wherein it is stated that: "We suggest that you forward this accounting either to us or direct to Al Kaiser Brothers in order to complete the file in this transaction and expedite payment to you of deficit incurred." We think complainant clearly is entitled to reimbursement.

The next problem is to determine the person or persons liable for payment of the deficit. Complainant has joined both Kaiser and Siegel as respondent parties. The pleadings and record show Siegel was acting either as Kaiser's agent, or as agent for both Kaiser and complainant. In either case, Kaiser was not an undisclosed principal. Upon well known principles of agency, Kaiser as the principal is liable to the complainant. This conclusion is not altered by the fact that Siegel may have failed to carry out some of Kaiser's instructions. It has been said that:

"If an act done by an agent is within the apparent scope of the authority with which he has been clothed, it matters not that it is directly contrary to the instructions of the principal; the latter will, nevertheless, be liable, unless the third person with whom the agent dealt knew that he was exceeding his authority or violating instructions."

*Farmers National Grain Company v. Young*, S. Ct. Okla. (1940) 187 Okla. 298, 102 Pac., 2d 180; 1 Agency Am. L. Inst. § 161.

The final question is whether Siegel is liable, not to Kaiser, but to complainant. It seems clear that complainant could recover from Siegel, as agent for complainant, for any loss attributable to the agent's failure to transmit instructions to complainant. However, Siegel's failure to transmit the instructions is not shown to have been the cause of the loss. A complaint against Siegel on this basis would therefore fail. A more difficult question would concern the right of complainant to recover from Siegel as agent of Kaiser. The answer would again appear to be that the agent's failure was not the cause of the loss, and Siegel therefore would not be liable. Although we are not concerned with a claim by Kaiser against Siegel, because none has been presented, it would appear that such claim would necessarily fail for the same reason.

In conclusion, the failure of Kaiser to reimburse complainant for the deficit incurred herein is in violation of section 2 of the act, for which reparation in the amount of \$179.85, plus interest, should be awarded complainant. The complaint, insofar as it relates to respondent Siegel, should be dismissed. The facts should be published.

#### ORDER

The complaint, insofar as it relates to respondent Simon Siegel Company, is dismissed.

Within 30 days from the date hereof, respondent Al Kaiser & Bros., Inc., shall pay to complainant, as reparation, \$179.85, with interest thereon at the rate of 5 percent per annum from September 1, 1946, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2473)

BENNETT & CLAYTON Co., INC. v. MILLER BROKERAGE Co. PACA  
Doc. No. 5348. Decided June 5, 1950.

#### Failure to Pay Purchase Price—Default

Where complainant sold a truckload of potatoes to respondent who accepted delivery but failed to pay the balance of the purchase price after credits were allowed by the complainant, and respondent failed to file an answer

to the complaint, held, that respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint, and its failure to pay the balance of the purchase price is a violation of the act for which reparation should be awarded to complainant, with interest.\*

*Bennett & Clayton Co., Inc.*, of Prospect Plains, New Jersey, complainant *pro se*.  
*Mr. E. D. Mulville*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1446 *et seq.*). Informal complaint was received March 16, 1950. Formal complaint was filed March 23, 1950, alleging that complainant sold potatoes to the respondent but that respondent has failed to pay a balance due of \$388.

The Regulatory Division of the Fruit and Vegetable Branch made an investigation and a copy of its report thereon was served upon complainant April 19, 1950. Copies of the formal complaint and the report of investigation were served upon respondent on April 18, 1950.

At the time of service of the complaint, respondent was notified in writing that an answer should be filed within 20 days thereafter and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint. Respondent has failed to file an answer and this proceeding is disposed of on the basis of such default.

### FINDINGS OF FACT

1. Complainant, Bennett & Clayton Co., Inc., is a corporation whose address is Prospect Plains, New Jersey.

2. Respondent is an individual, W. L. Miller, trading as Miller Brokerage Company, whose address is 323-329 North Lee Street, Salisbury, North Carolina. At the time of the transaction complained of herein, respondent was not licensed but was subject to license under the act. Subsequently, respondent paid license fee arrearage to cover the period when this transaction occurred.

3. On or about September 28, 1949, complainant and respondent entered into a contract for the sale by complainant to respondent of one truckload of U. S. No. 1 potatoes, at the agreed price of \$2.35 per cwt., delivered at Salisbury, North Carolina.

4. On September 29, 1949, complainant shipped in interstate commerce from Prospect Plains, New Jersey, to respondent at Salisbury, North Carolina, 300 sacks of potatoes, 100 pounds net weight each.

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

The potatoes were officially inspected at shipping point and certified as grading U. S. No. 1, Size A, 2-inch minimum.

5. Upon arrival of the shipment at Salisbury, North Carolina, on October 1, 1949, respondent accepted the potatoes.

6. Complainant invoiced respondent for the 300 sacks of potatoes at the contract price of \$2.35 per sack, or \$705, less \$35 transportation charges on the shipment paid by respondent. On October 31, 1949, complainant accepted the return of 120 sacks of the potatoes and credited respondent for the original sale price of \$2.35 per sack, or \$282, reducing respondent's obligation to complainant to \$388. Respondent owes complainant \$388 under the contract, no part of which has been paid.

7. Informal complaint was received March 16, 1950, which was within nine months after the cause of action accrued.

### CONCLUSIONS

Failure of respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint as provided for in the rules of practice (7 CFR 47.8 (c)).

The record shows that complainant sold to respondent a truckload of U. S. No. 1 potatoes for an agreed contract price of \$2.35 per cwt., delivered; that in accordance with the terms of the contract, 300 sacks of U. S. No. 1 potatoes were shipped in interstate commerce to the respondent; that upon arrival at destination respondent accepted the potatoes; and that respondent was credited with \$35 transportation charge and \$282 for the return of 120 sacks of potatoes to the complainant, leaving a balance due of \$388, no part of which has been paid by respondent.

Respondent's failure to pay the balance due on the contract purchase price is in violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$388, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$388, with interest thereon at the rate of 5 per cent per annum from October 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2474)

ROY A. CATHER v. FAIRMONT PRODUCE COMPANY. PACA Doc. No. 5347. Decided June 6, 1950.

**Failure to Pay Balance of Purchase Price—Default**

Where complainant alleged failure of respondent to pay the balance of the purchase price of 213 crates of peaches sold to and accepted by respondent and the latter failed to file an answer, held, respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint, and its failure to pay the balance of the agreed price is a violation of section 2 of the act for which reparation should be awarded complainant.\*

*Mr. Roy A. Cather*, of Winchester, Virginia, complainant *pro se*. *Mr. Webster P. Mason*, Presiding Officer

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*), instituted to recover the balance of the purchase price of 213 crates of peaches sold by complainant to respondent on or about August 5, 1949. Informal complaint was received by the Regulatory Division, Fruit and Vegetable Branch, on December 2, 1949. A formal complaint was filed April 13, 1950.

A copy of the formal complaint was served by registered mail on respondent on April 18, 1950. On the same date both parties received copies of the report of investigation made by the Department.

At the time of service of the complaint respondent was notified in writing that it had 20 days from the time it received the complaint in which to file a formal answer, and that, in accordance with section 47.8 (c) of the rules of practice, failure to file an answer would constitute an admission of the facts alleged in the complaint. Respondent has failed to file an answer, and this proceeding is disposed of on the basis of such default.

**FINDINGS OF FACT**

1. Complainant is an individual, Roy A. Cather, doing business as Old Mill Storage, whose post office address is Box 403, Winchester, Virginia.

2. Respondent is an individual, William Johnston, doing business as Fairmont Produce Company, whose address is 309 4th Street, Fairmont, West Virginia. At the time of the transaction involved herein,

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.



respondent was not licensed, but was subject to license under the act. He subsequently obtained a license and paid arrearage covering the period in which the transaction occurred.

3. On or about August 5, 1949, complainant, by oral contract, sold to respondent, in the course of interstate commerce, 213 crates of tree-run peaches for a total agreed price of \$317.85, f. o. b. respondent's truck at Winchester, Virginia. This price included a deposit of 65 cents per crate for the 213 "heavy" crates furnished, which crates were to be returned.

4. Respondent, at the time of the sale, returned to complainant 147 "light" crates which had been furnished with a previous purchase, and was credited 35 cents each, or a total of \$51.45, therefor, thus leaving a balance of \$266.40 due on the transaction involved herein.

5. The purchase of these peaches was negotiated through a broker, R. E. Worsley, who acted as an agent of respondent, and who inspected the commodity at shipping point.

6. On the date of the transaction, complainant delivered to respondent's truck at Winchester, Virginia, for transportation in interstate commerce to Fairmont, West Virginia, the 213 crates of peaches thus sold. Respondent accepted the shipment and paid therefor by check in the amount of \$266.40. This check, upon presentation for payment in due course, was returned to complainant marked "not sufficient funds."

7. On September 19, 1949, respondent made part payment in the amount of \$150 by Western Union money order, leaving a balance of \$116.40, no part of which has been paid.

8. Informal complaint was filed within 9 months after the cause of action accrued.

#### CONCLUSIONS

Failure of respondent to file an answer to the complaint constitutes an admission of the facts alleged in the complaint as provided in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that complainant, by oral contract, sold to respondent for shipment in interstate commerce, 213 crates of tree-run peaches for a total agreed price of \$317.85, including a deposit of \$138.45 on the crates used, f. o. b. respondent's truck at shipping point, Winchester, Virginia; that the peaches were delivered to and accepted by respondent; that respondent was given a credit of \$51.45 for certain other crates returned, and later paid \$150 on this account, thereby leaving a balance of \$116.40 still due and unpaid.

Respondent's failure to pay the balance of the purchase price is a violation of section 2 of the act. Complainant should be awarded reparation in the amount of \$116.40, plus interest, and the facts should be published.

**ORDER**

Within 30 days from the date of this order, respondent shall pay to complainant, as reparation, \$116.40, with interest thereon at the rate of 5 percent per annum from September 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published. Copies hereof shall be served upon the parties.

(No. 2475)

PACA Doc. No. 5177.\* Decided June 12, 1950.

**Dismissal—Rolling Car—Effect of Failure to Divert at Proper Point—Through Rate Unprotected—Effect of Agreement by Buyer to Accept Shipment where Through Rate Not Protected**

Where complainant purchased from respondent a rolling car of lettuce which was shipped from California and was to be diverted at Kansas City to complainant at Minneapolis, but the diversion order was received too late to accomplish diversion at Kansas City, causing the shipment to proceed to Chicago before being routed to Minneapolis, where it arrived several days late and without protection of the through freight rate, it is held, in an action against the seller by the buyer for damages based upon extra freight charges and alleged losses due to market decline, that the evidence shows the buyer agreed to accept the lettuce irrespective of the fact that the through freight rate was not protected and that, consequently, complainant is not entitled to reparation for excess freight charges or alleged losses resulting from market decline, and complaint should be dismissed.\*\*

Complainant *pro se*. Messrs. Wyckoff, Gardner, Parker & Boyle, of Watsonville, California, for respondent. Miss Lenore H. Langford, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

In this proceeding under the Perishable Agricultural Commodities Act, 1930 (7 U. S. C. 1946 ed. 499a *et seq.*), a formal complaint was filed on August 1, 1949, in which complainant alleged a failure on the part of respondent properly and seasonably to divert a car of lettuce purchased by complainant from respondent, thereby causing complainant to suffer damages in the form of additional freight charges and lost profits due to market decline. Complainant seeks an award of reparation in the amount of \$205.45.

A copy of the report of an investigation made by the Fruit and Vegetable Branch of the Department was served upon complainant

\*As explained in Prefatory Note, the identities of the parties are not disclosed.—Ed.

\*\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

by registered mail on August 29, 1949. Copies of the formal complaint and the investigation report were served by registered mail upon respondent on August 30, 1949.

On September 14, 1949, respondent filed an answer to the complaint alleging, in substance, that she telephoned the diversion order to the carrier shortly after the sale to complainant was made; that the diversion by phone was twice confirmed in writing on the same day; that 27 minutes after receiving the message by telephone, the carrier telegraphed the diversion order to \* \* \*, at which point the car of lettuce was to be diverted to \* \* \*; that about 3 p. m. on the same day, the carrier informed respondent that the diversion order had been received in \* \* \* too late to be effective and that the through freight rate to \* \* \* would not be protected; that respondent immediately informed complainant's agent of the situation; and that complainant's agent stated the car of lettuce was acceptable even though the through rate was not protected. Respondent denied that she violated the act or that she is indebted to complainant in the amount claimed.

Since the amount of the damages claimed is less than \$500, the issues are determined under the shortened procedure as provided by the rules of practice.

#### FINDINGS OF FACT

1. Complainant is a partnership composed of \* \* \*, doing business as \* \* \*, whose address is \* \* \*.

2. Respondent is an individual, \* \* \*, doing business under the trade name of \* \* \*, whose address is \* \* \*. At the time of the transaction in controversy, respondent was licensed under the act.

3. On or about January 3, 1948, at about 9:45 a. m., in the course of interstate commerce, complainant purchased from respondent a carload consisting of 318 crates of icepack lettuce, Size 5, Lucky Strike brand, at \$4 per crate, f. o. b. \* \* \*, top ice \$60 extra, to be shipped to complainant at \* \* \*.

4. The contract was negotiated by \* \* \*, a broker at \* \* \*, who acted in the transaction as agent for complainant.

5. The lettuce was shipped from \* \* \*, on December 29, 1947, in car SFRD 4200, billed to respondent at \* \* \*. On January 2, 1948, respondent diverted the car to herself at \* \* \*. At 10 a. m., P. S. T., on January 3, 1948, respondent notified the Atchison, Topeka & Santa Fe Railroad at \* \* \*, by telephone, to divert the car SFRD 4200 to complainant at \* \* \*. This oral diversion was confirmed by written diversion order delivered to the carrier on the

same day. At 10:27 a. m., P. S. T., the carrier wired diversion order to \* \* \* to divert car SFRD 4200 to complainant at \* \* \*.

6. At 3 p. m., P. S. T., on January 3, 1948, the Atchison, Topeka & Santa Fe Railroad at \* \* \*, informed respondent that the diversion order arrived at \* \* \* too late to effect diversion at that point and that the through freight rate to \* \* \* would not be protected.

7. On the same afternoon, respondent notified complainant's agent, \* \* \*, by long distance telephone, that the diversion order was received too late to accomplish diversion at \* \* \*, and that the through freight rate would not be protected. \* \* \* informed respondent that complainant would accept the car of lettuce even though the through rate was not protected.

8. Car SFRD 4200 arrived at \* \* \* and was made available for the market of January 9, 1948. Complainant accepted the shipment and on January 26, 1948, paid respondent the full purchase price for the lettuce. Complainant paid additional freight charges of \$125.95 because the car of lettuce was not diverted at \* \* \*.

9. An informal complaint was filed on September 2, 1948, which was within 9 months from the time the alleged cause of action accrued.

#### CONCLUSIONS

Complainant contends that had respondent "seasonably and properly" diverted the car of lettuce in controversy, the lettuce would have been available for the market of January 5 or 6, but that because of delay due to failure of diversion, the lettuce was not available until January 9, by which time the market price had declined from \$4.75 per crate to \$4.50 per crate, causing complainant to suffer a loss of \$79.50. Also, that complainant was compelled to pay additional freight charges because the car proceeded to \* \* \* and the through freight rate was not protected to \* \* \*. Respondent denies any responsibility as a result of the failure of diversion at \* \* \*.

Respondent's sales manager, \* \* \*, states in his affidavit, which constitutes respondent's answering statement, that after being notified by the carrier that the car of lettuce had passed the diversion point and the through freight rate would not apply, he called \* \* \*, complainant's agent, at \* \* \*, by long distance telephone and informed him of that fact. \* \* \* states that \* \* \* told him complainant would accept the car of lettuce even though diversion had not been accomplished at \* \* \* and the through rate was not protected.

In a letter to complainant, dated October 5, 1949, \* \* \* denied that there was any conversation between himself and \* \* \*,

"written or verbal," as to the car missing diversion, and states that "a check on phone calls from \* \* \* to \* \* \* may be made to verify." However, there is attached to the affidavit of \* \* \* an original charge slip from the Colorado River Telephone Company showing a call on the afternoon of January 3, 1948, from respondent's office phone \* \* \* to \* \* \*, which it appears was \* \* \* phone number at \* \* \*, where \* \* \* maintained an office. While \* \* \* does not flatly deny, in the face of the telephone company's charge slip, that \* \* \* called him and talked with him about the car of lettuce, he states in a subsequent affidavit, which comprises complainant's statement in reply, as follows:

"Your affiant wishes to observe that there is no proof that any of the telephone conversations which took place between the office of respondent and affiant on the said date dealt in any way with the point at issue, and this affiant takes the present occasion to deny that anything was said by the respondents' sales manager on the aforesaid date concerning respondents' failure to accomplish diversion."

\* \* \* denial, as compared with \* \* \*, clear and straightforward account of the transaction, which is supported by the phone company's charge slip, is far from convincing. Moreover, complainant's telegram to \* \* \* at 9 a.m. on January 3, 1948, concerning the lettuce in controversy, indicates complainant was eager to buy lettuce at that time. The telegram reads:

"OKAY LUCKY STRIKE OUT 29TH TAKE TWO OR THREE CARS LETTUCE TODAY GET US TOP BRANDS IF POSSIBLE IN CASE WANT SELL EAST"

It appears that complainant wanted not only the car of lettuce in question but also several additional cars. The market was good and complainant was probably not too much concerned about excess freight charges and delay on this one car of lettuce as indicated by the fact that complainant accepted the shipment upon arrival and subsequently paid respondent the full purchase price without complaint or protest of any kind.

In the light of all the circumstances and what has been said above, it is concluded that complainant, through its agent, agreed to accept the car of lettuce here involved, irrespective of the fact that the through freight rate to \* \* \* was not protected, and that, consequently, complainant is not entitled to an award of reparation for the excess freight charges or alleged losses resulting from market decline. The complaint should be dismissed.

#### ORDER

The complaint is hereby dismissed.

Copies hereof shall be served upon the parties.

(No. 2476)

MORRIS PORTNOY CO. v. L. W. SWEAT PRODUCE CO. PACA Doc. No. 5363. Decided June 13, 1950.

**Failure to Pay Balance of Purchase Price—Default**

Where complainant seeks to recover the balance of the purchase price of six lots of fresh vegetables sold to respondent and the latter failed to file an answer to the formal complaint, held, that respondent's failure to file an answer constitutes an admission of the facts alleged in the complaint, and its failure to promptly make payment is a violation of section 2 of the act for which complainant is entitled to an award of reparation in the amount of the balance of the agreed price.\*

*Morris Portnoy Company*, of Jacksonville, Florida, complainant *pro se*. *Mr. Frederick W. Woodley*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

**PRELIMINARY STATEMENT**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Complainant filed an informal complaint on November 17, 1949, and a formal complaint on April 25, 1950. Complainant seeks an award of reparation in the amount of \$580.05, the balance of the purchase prices of various lots of vegetables sold to respondent during April and May 1949.

A copy of the report of investigation made by the Fruit and Vegetable Branch was served by registered mail upon complainant on May 3, 1950. A copy of the formal complaint and a copy of the report of investigation were served upon respondent by registered mail on the same day.

At the time of service of the formal complaint, respondent was notified in writing that it would have 20 days thereafter within which to file an answer to the complaint and that, in accordance with section 47.8 (c) of the rules of practice, failure to file such answer would constitute an admission of the facts alleged in the complaint. Respondent has failed to file an answer and this proceeding is disposed of on the basis of the facts alleged in the formal complaint and the report of investigation.

**FINDINGS OF FACT**

1. Complainant is an individual, Morris Portnoy, doing business as Morris Portnoy Co. whose address is Jacksonville Produce Market, Jacksonville, Florida.

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

2. Respondent is an individual, Lawrence W. Sweat, doing business as L. W. Sweat Produce Co. whose address is 71 State Street, Charleston, South Carolina. At the time of the transactions involved herein, respondent was licensed under the act.

3. During the months of April and May, 1949, in the course of interstate commerce, complainant sold to respondent, after inspection by respondent, six lots of fresh vegetables, consisting of beans, tomatoes, peppers, squash, okra, corn, potatoes, cucumbers and celery. The dates of sale and agreed purchase prices for the several lots were as follows:

April 17.....	\$398. 25
April 20.....	154. 00
April 24.....	166. 00
April 27.....	120. 50
April 29.....	22. 50
May 1.....	68. 80

Total.....	930. 05
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4. As to each lot, and on the date of sale, complainant delivered to respondent vegetables meeting contract requirements. Respondent accepted delivery of the six lots of vegetables and transported them by truck from Jacksonville, Florida, to Charleston, South Carolina.

5. On April 26, 1949, respondent gave to complainant a check in the amount of \$522.25, as payment for the first two lots. This check was returned unpaid by the bank on which drawn. Respondent subsequently paid complainant \$400 of which \$100 was in repayment of a cash advance in that amount made by complainant to respondent on April 24, 1949. A further payment of \$50 was made by respondent on January 4, 1950. Respondent has failed and refused to pay the balance due of \$580.05.

6. The informal complaint was filed November 17, 1949, which was within nine months after the cause of action accrued.

### CONCLUSIONS

The failure of respondent to file an answer to the formal complaint constitutes an admission of the facts alleged therein, as provided in the rules of practice (7 CFR 47.8 (c)).

The facts thus admitted are that respondent purchased from complainant during April and May 1949 six lots of fresh vegetables for prices totaling \$930.05; that respondent received and accepted the commodities, and transported them in interstate commerce; and that respondent paid complainant \$350, but failed to pay the balance of \$580.05.

The failure of respondent to pay promptly the balance of the agreed purchase price is in violation of section 2 of the act. Complainant

should be awarded reparation in the amount of \$580.05, with interest, and the facts should be published.

### ORDER

Within 30 days from the date of this decision, respondent shall pay to complainant, as reparation, \$580.05, with interest thereon at the rate of 5 percent per annum from May 1, 1949, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2477)

EDNA M. SECHLER v. TOM BLACK, INC. PACA Doc. No. 5161. Decided June 13, 1950.

#### Failure to Pay Balance of Purchase Price

Where complainant sold to respondent a truckload of potatoes for a total agreed price of \$770, and respondent has paid or been allowed credits thereon to the extent of \$253.64, but has failed to pay the balance due, held, such failure to pay the balance of the agreed purchase price is a violation of section 2 of the act for which reparation should be awarded to complainant.\*

#### Assignment of Claim—Right of Assignor to Maintain Proceeding

Where seller, prior to filing with the Department a complaint against buyer, assigned his claim for the purchase price to a bank as security for a loan of lesser amount than the claim, held, that, since the assignment was merely a security transaction which did not divest the assignor of all right, title, and interest in the claim, the assignor retained an equity therein, and may maintain this proceeding on the claim.\*

#### Effect of Failure to Defend Counterclaim Based on Lack of Suitable Shipping Condition

Where respondent filed a counterclaim alleging that complainant sold to respondent a carload of potatoes loaded in such condition that 60 bags had to be resorted because of mold and rot, resulting in a loss of 16 bags, and complainant offered no defense against this counterclaim, held, the counterclaim should be allowed.\*

#### Jurisdiction of Secretary—Effect of Failure to File Counterclaim within Limitation Period

Where respondent filed a counterclaim on an alleged cause of action which arose more than nine months prior thereto, although it sought merely to reduce complainant's claim by way of recoupment, held, such counterclaim cannot be allowed because it was based upon a transaction separate from that set forth in the complaint.\*

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.



*Mrs Edna M. Sechler*, of Kempton, Pennsylvania, complainant *pro se*. *Mr. W. W. Kennerly*, of Donaldson, Montgomery & Kennerly, of Knoxville, Tennessee, for respondent. *Miss Lenore H. Langford*, Presiding Officer.

*Decision by Thomas J. Flavin, Judicial Officer*

### PRELIMINARY STATEMENT

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C. 1946 ed. 499a *et seq.*). Complainant seeks to recover the balance of the purchase price of a truckload of potatoes sold to respondent in September, 1948.

Informal complaint was received by the Regulatory Division, Fruit and Vegetable Branch on January 5, 1949, and a formal complaint was filed on March 8, 1949. A copy of the formal complaint, together with a copy of the report of investigation prepared by the Regulatory Division, was served on respondent by registered mail on July 11, 1949. Complainant was served with a copy of the report of investigation on July 9, 1949.

Respondent, in its answer filed July 26, 1949, admits its liability for the purchase price of the truckload of potatoes shipped in September, 1948, but asserts a countercomplaint based on two previous transactions. The first item of the countercomplaint is a claim for \$457.32, the alleged loss on a shipment from complainant which arrived on February 21, 1948. The other claim included in the countercomplaint is for \$59.04, the cost of 16 bags of potatoes allegedly dumped from a car which arrived June 20, 1948. Informal complaint concerning these two transactions was filed on February 2, 1949.

Since neither party requested an oral hearing, the matter is being disposed of under the shortened procedure authorized by section 47.20 of the amended rules of practice (7 CFR 1945 Supp. 47.20).

### FINDINGS OF FACT

1. Complainant is an individual, Edna M. Sechler, whose post office address is Kempton, Pennsylvania. Complainant was licensed under the act at the time of the transactions involved in this case.

2. Respondent, Tom Black, Inc., is a corporation whose post office address is 561 Mitchell Street, Knoxville, Tennessee. At the time of the transactions stated in the complaint, respondent was not licensed under the act, but was subject to license. Respondent was issued a license on October 18, 1948, and at that time paid arrearage back to July 1947.

3. On or about September 16, 1948, complainant sold to respondent a truckload of potatoes containing 250 bags at \$2.35 per bag, plus truck freight of \$0.73 per bag, or a total price of \$770.00. The load was shipped on September 23, 1948, and was accepted by respondent

upon arrival. Respondent admits liability for the purchase price of this shipment. The account covering this transaction was assigned by complainant as collateral for a loan in the amount of \$735.00, to the National Bank of Hamburg, Hamburg, Pennsylvania, and a total of \$253.64 has been remitted by respondent on this account.

4. Respondent bases the first item of its countercomplaint, the alleged loss of \$457.32, on a transaction between the same parties on February 13, 1948. Respondent failed to file a complaint in connection with that transaction within the nine-month period prescribed by the act.

5. Complainant employed a freight claim agent to prosecute a claim against the railroad for the loss sustained on the February 13, 1948, shipment. A net of \$122.50 was received by complainant on this claim (an award of \$175 minus 30 percent collection fees). Since respondent paid in full for that shipment without allowance, the amount received was applied by complainant to the account on which the complaint is filed in this case, namely the account covering the truck shipment of September 23, 1948.

6. On June 14, 1948, in response to a previous order, complainant caused to be shipped to respondent, in car FGE 19582, 300 bags of North Carolina potatoes at an agreed price of \$3.15 per bag f. o. b. Mount Olive, North Carolina. The car arrived on June 20, 1948, and unloading was commenced on the following day. The potatoes in the car were in unsuitable shipping condition and therefore 60 bags had to be resorted with a loss of 16 bags because of rot and mold. Respondent sent an invoice to complainant for the amount of this loss, \$59.04. No adjustment has been made for this loss and respondent now includes this amount as the second item of its countercomplaint.

7. Informal complaint was filed within nine months after the complainant's cause of action accrued. Respondent's informal complaint covering the February 13, 1948 and June 14, 1948, transactions was filed on February 2, 1949.

### CONCLUSIONS

Respondent would, at the outset, thwart any consideration of the claim in this case with the contention that complainant cannot maintain this proceeding because the account upon which the claim was filed has been assigned by complainant to the National Bank of Hamburg. This contention is without merit. The assignment did not transfer all right, title, and interest in the account, but rather was merely a security transaction. Apparently the account was assigned as collateral for complainant's note to the bank in exchange for a loan in the amount of \$735 (Exhibit F attached to the report of in-

vestigation). Payment was directed to be made to the bank only to insure repayment of the loan. Complainant retained an equity in this account and is the real party in interest in this proceeding. Therefore, we have jurisdiction to entertain the complaint under the Perishable Agricultural Commodities Act.

Respondent answers the complaint with a countercomplaint involving two previous transactions; one in February and the other in June 1948. Respondent's informal complaint covering these two transactions was received by the Department on February 2, 1949. Therefore, the next question is whether we have jurisdiction over the countercomplaint. The first item in respondent's countercomplaint is a claim for \$457.32 which amount respondent alleges represents its loss on the February 13, 1948, shipment. The Perishable Agricultural Commodities Act, section 6 (a) requires claims to be filed within nine months after the cause of action accrues.

The immediate question is whether this provision of the act bars the first item of respondent's countercomplaint. The rule is clearly set forth in *Ricks Fertilizer Co. v. Dunn & Co.*, PACA Doc. No. 4421, 5 A. D. 195 (1946) and again in 6 A. D. 231 and 8 A. D. 403. A countercomplaint which seeks affirmative relief must be dismissed where it is not filed within nine months as provided by the act. However, it may be allowed to reduce complainant's claim by way of recoupment *if it arises out of the same transaction*. The claim on the February 13, 1948, transaction does not come within the rule. Although it seeks merely to reduce the amount of petitioner's claim and does not seek affirmative relief, still it does not arise out of the same transaction and thus cannot be considered for purposes of recoupment. Therefore, we have no alternative but to dismiss the first item of the countercomplaint for want of jurisdiction.

Respondent admits its liability for the potatoes purchased on September 23, 1948, the truck shipment on which complainant's claim is based, and thus the details of that transaction need not be examined.

With these two transactions eliminated, only one other remains to be considered. That is the other item, the second item, of respondent's countercomplaint involving the sale of a carload of potatoes on June 14, 1948. It was simply a shipment from which 60 bags had to be re-sorted because of mold and rot, resulting in a loss of 16 bags at \$3.15 per bag, plus freight at \$.54 per bag, or a total of \$59.04. Respondent invoiced complainant for this loss. Complainant's agent, Mr. H. W. Sofield, replied to the effect that the potatoes were probably loaded in unsuitable shipping condition and that complainant would do everything possible to effect a satisfactory adjustment.

Respondent clearly states a valid cause of action with respect to this loss. Yet complainant offers no defense whatsoever to this

counterclaim except to insist repeatedly that it is not a proper one for consideration under the Perishable Agricultural Commodities Act, without offering any reason for this contention. Since no reason appears, and since respondent clearly states a prima facie case, complainant's failure to defend against this claim can result only in its being allowed.

Respondent's failure to pay the balance of the purchase price of the truckload of potatoes delivered to it in September 1948 is a violation of section 2 of the act for which reparation should be awarded. Likewise, complainant's delivery, in June 1948, of a carload of potatoes loaded in unsuitable shipping condition is a breach of warranty in violation of section 2 of the act which renders complainant liable for respondent's loss therefrom.

Complainant's claim for \$516.36 should be allowed, as diminished by the \$122.50 award from the railroad which complainant has applied to respondent's account, and by respondent's claim on the June 14th transaction in the amount of \$59.04. Thus the balance of \$334.82 plus interest should be paid by respondent, to the order of the complainant, Edna M. Sechler, and her assignee, the National Bank of Hamburg, and the facts should be published.

#### ORDER

Within 30 days from the date of this order, respondent shall pay to complainant and her assignee, as reparation, \$334.82, with interest thereon at the rate of 5 percent per annum from October 1, 1948, until paid.

The facts and circumstances as set forth herein shall be published.

Copies hereof shall be served upon the parties.

(No. 2478)

THE SCHUMAN COMPANY v. E. L. BARLOW. PACA Doc. No. 4959.

Decided June 13, 1950.

#### Dismissal of Petition for Reconsideration

Petition for reconsideration dismissed where the prior order is supported by the evidence of record and applicable law.\*

*Mr. Ned Stein*, of Philadelphia, Pennsylvania, for respondent.

*Decision by Thomas J. Flavin, Judicial Officer*

#### ORDER DISMISSING PETITION FOR RECONSIDERATION

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C., 1946 ed., 499a *et seq.*).

\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

By order dated May 10, 1950, complainant was awarded reparation against respondent in the amount of \$1,175.84, with interest at 5 percent per annum from January 1, 1948, until paid. On May 17, 1950, and within the time provided by the rules of practice, respondent filed a petition for reconsideration.

Respondent contends that the Secretary did not give due consideration to respondent's allegations and evidence that complainant made fraudulent representations concerning the shipments. Respondent further contends that the result herein should be controlled by the decision in *Joseph Martinelli & Co., Inc. v. Simon Siegel Company*, 176 F. 2d 98, 8 A. D. 981.

The Circuit Court decision in the case just referred to is to the effect that a purchaser who has been induced to enter into a contract by fraud has the right to avoid the contract; that exercising such right avoids the entire contract, including limiting provisions such as "acceptance final;" that the term "acceptance final" in a voided contract is no bar to rejection; and that the purchaser's breach of the contract before discovery of the fraud will not deprive him of his right of avoidance. Had respondent in the case before us proved that the contract in question was induced by fraud, then the relief indicated by the court in the *Martinelli* decision would perhaps be available to respondent. However, as set forth in our order of May 10, 1950, we are of the opinion that respondent has not established by a preponderance of the evidence the fraud which he alleges. We think the order of May 10, 1950, is supported by the evidence of record and applicable law. Respondent's petition, therefore, should be and is hereby dismissed.

The reparation awarded in the order of May 10, 1950, shall be paid within 30 days from the date hereof.

This order shall be published.

Copies hereof shall be served upon the parties.

(No. 2479)

PACA Doc. No. 5005.\* Decided June 13, 1950.

#### Dismissal of Petitions for Reconsideration

Petitions for reconsideration dismissed where the prior order is supported by the evidence of record and applicable law.\*\*

*Mr. Ned Stein*, of Philadelphia, Pennsylvania, for complainant. *Mr. Earl J. Gratz* and *Mr. David B. Fitzgerald*, of Philadelphia, Pennsylvania, for respondent.

*Decision by Thomas J. Flavin, Judicial Officer*

\*As explained in Prefatory Note, the identities of the parties are not disclosed.—Ed.

\*\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

**ORDER DISMISSING PETITIONS FOR RECONSIDERATION**

This is a reparation proceeding under the Perishable Agricultural Commodities Act, 1930, as amended (7 U. S. C., 1946 ed., 499a *et seq.*). On May 10, 1950, an interim order was issued wherein the respective rights of complainant and of respondent were determined in connection with their joint-account agreement for the handling of three carloads of celery. The shipments of celery had also been made the subject of a complaint filed by a third party, \* \* \*, against \* \* \* in a reparation proceeding under the act designated as PACA Docket No. 4959. In PACA Docket No. 4959 \* \* \* was ordered to pay to \* \* \* a designated sum of money as reparation. In this proceeding it was determined by the order of May 10, 1950, that \* \* \* is liable to \* \* \* for one-half of whatever \* \* \* pays to \* \* \* pursuant to the other order, and that failure of \* \* \* to pay half of such amount would be in violation of the act. In order to give the parties an opportunity to settle on the basis indicated, it was ordered that this proceeding be held in abeyance pending the issuance of a further order herein. Copies of the order of May 10, 1950, were served by registered mail upon respondent on May 15, 1950, and upon complainant on May 16, 1950. On May 16, 1950, and within the time prescribed by the rules of practice, respondent filed a petition for reconsideration. On May 19, 1950, and within the time prescribed by the rules of practice, complainant filed his petition for reconsideration of the order of May 10, 1950.

In his petition for reconsideration respondent alleges numerous errors in our previous order, both as to findings of fact and as to conclusions of law. One of respondent's allegations is that the Department erred in failing to find as a fact that respondent repeatedly urged complainant not to reject the shipments and that complainant refused to comply with respondent's entreaties. In our opinion such a finding is unnecessary and, even had it been included in the decision, would not have changed the result. In paragraph 5 of the "Conclusions" in the decision of May 10, 1950, we discussed \* \* \* obligations under his contract with \* \* \* and \* \* \* rejections of the three shipments in question. We pointed out that, under the circumstances, there was a possibility that at the time of the rejections complainant's action was legally justifiable and could not be held to be in wanton or flagrant disregard of his partnership obligations. At the hearing in this proceeding, \* \* \* admitted that, upon learning of the rejections, \* \* \* told him to "accept the cars and sell them, and then we will see what we can do with \* \* \*." Assuming that \* \* \* did repeatedly urge \* \* \* not to reject the shipments, it would appear that complainant, in the exercise

of his own judgment, chose to disregard \* \* \* suggestions. But this factor, considered in the light of the other circumstances surrounding the rejections, would not, in our opinion, show that \* \* \* actions were in wanton or flagrant disregard of his contract obligations. The remainder of the issues raised by respondent in his petition for reconsideration were decided either specifically or by necessary inference in the order of May 10, 1950. In our opinion, the previous order is supported by the evidence of record and by applicable law. Accordingly, respondent's petition for reconsideration is hereby dismissed.

Complainant's petition for reconsideration is to the effect that the Secretary should have ordered respondent \* \* \* to pay a specified amount in this proceeding. In other words, complainant contends that, assuming the award against \* \* \* in PACA Docket No. 4950 stands, then \* \* \* liability to \* \* \* should be fixed and the requirements of contribution should not be dependent upon payments first being made by \* \* \* to \* \* \*. The basis for our holding that \* \* \* liability is contingent upon payments being made by \* \* \* was set forth in our previous order and we think the order is supported by the evidence and the law. Accordingly, complainant's petition for reconsideration should be and is hereby dismissed.

This proceeding shall continue to be held in abeyance pending the issuance of a further order herein.

Copies hereof shall be served upon the parties.

## COURT DECISIONS

BALAZS *et al.* v. BRANNAN, SECRETARY OF AGRICULTURE, *et al.*, 87 F. Supp. 119. Decided September 29, 1949.

UNITED STATES DISTRICT COURT, N. D. OHIO, EASTERN DIVISION

Civil Action No. 25208

### Milk Regulated Under Order No. 75 as Affecting Interstate Commerce

Where plaintiffs contended that the amount of milk in interstate commerce is so small in comparison to the total amount of milk regulated that Order No. 75, regulating the price paid to milk producer in the Cleveland, Ohio Marketing Area, is an exercise of power not authorized by the act, or if the act be construed to authorize the Order, then, the act so construed is unconstitutional, the District Court held, that the Order was valid because the handling of milk directly affected interstate commerce, though receipts of milk in the marketing area from out-of-state sources was less than one percent, where 2,303,910 pounds of milk were annually involved in interstate commerce.

### Commerce—Regulation of Intrastate Commerce Substantially Affecting Interstate Commerce

Intrastate milk substantially affecting interstate commerce is subject to regulation under the act.

†[119] Joseph Balazs, doing business as Balazs Dairy Products, and others brought an action under the Agricultural Marketing Agreement Act against Charles F. Brannan, Secretary of Agriculture, and others, to review a ruling dismissing petitions requesting that milk marketing order be declared invalid or that it be modified.

The District Court, Freed, J., denied relief, holding that the milk marketing order was not an unauthorized act of power.

See also D. C., 77 F. Supp. 612.

Paul W. Walter, Cleveland, Ohio, Loyal V. Buescher, Cleveland, Ohio, for plaintiffs.

Don C. Miller, U. S. District Attorney, Cleveland, Ohio, J. Stephen Doyle, Jr., Special Ass't Att'y Gen'l, for defendants.

FREED, *District Judge.*

This is an action to review a ruling by the Judicial Officer, acting for the Secretary of Agriculture, on September 15, 1947, dismissing the petitions of plaintiffs requesting that Milk Marketing Order No. 75 be declared invalid or be modified in certain respects. The peti-

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† Italic figures in brackets refer to page in 87 F. Supp. 119.—Ed.



tions had been filed pursuant to § 8c (15) (A) of the Agricultural Marketing Agreement Act of 1937, 7 U. S. C. A. § 608c (15) (A), which provides that the ruling of the Judicial Officer "shall be final, if in accordance with law." The present proceeding, filed under 7 U. S. C. A. § 608c (15) (B), is brought to determine if the ruling is "in accordance with law".

Order No. 75, regulating the price paid to milk producers in the Cleveland, Ohio marketing area, was issued by the Secretary †[120] of Agriculture on July 26, 1946, 7 C. F. R. 1946 Supp. 975, after compliance with statutory procedure of notice, hearing, etc. The Order is in substance of the type described in *U. S. v. Rock Royal Co-operative, Inc.*, 307 U. S. 533, 59 S. Ct. 993, 83 L. Ed. 1446, in which the validity of the Agricultural Marketing Agreement Act of 1937, 7 U. S. C. A. § 601 et seq. was upheld.

Plaintiffs are "handlers" of milk in the Cleveland area and are subject to the provisions of Order No. 75. Their attack on Order No. 75 centers around the question whether the milk regulated thereunder is "in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce" within the meaning of 7 U. S. C. A. § 608c (1). Other questions were suggested by the complaint but have not been pressed.

[1] Plaintiffs contend that the amount of milk in interstate commerce is so small in comparison to the total amount of milk regulated that the Order is an exercise of power not authorized by the Act; or if the Act be construed to authorize the Order, then, plaintiffs assert, the Act so construed is unconstitutional. In *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110, at page 125, 62 S. Ct. 523, 529, 86 L. Ed. 726, it was said:

"We think it clear that Congress, by the provisions of § 8c (1) conferred upon the Secretary authority to regulate the handling of intrastate products which by reason of its competition with the handling of the interstate milk so affects that commerce as substantially to interfere with its regulation by Congress \* \* \*." Thus, plaintiffs are remitted to a constitutional not a statutory argument.

Plaintiffs concede that in the last full year before issuance of the Order one-half of one per cent of the receipts of milk in the marketing area came from out-of-state sources. The defendant asserts that this figure is at least seven-tenths of one per cent and also insists that shipments of "other source milk", which are not priced by the Order, should be considered in resolving the constitutional issue. Plaintiffs dispute this. They also argue that the Judicial Officer's findings of substantial shipments of Ohio milk and milk products into other states, of substantial competition in the procurement of milk for intrastate

† Italic figures in brackets refer to page in 87 F. Supp. 119.—Ed.

and interstate uses, and of an overlapping of the Cleveland milk-shed with the regulated milk-sheds of other cities are unsupported factually or are immaterial legally.

The Court does not find it necessary to make a finding on all these matters, for the conceded fact that a substantial amount of milk involved in the Order moves in interstate commerce is sufficient in itself to sustain the validity of Order No. 75.

[2] It was fairly early made clear that the Federal Government might regulate intrastate commerce if necessary to make effective its regulation of interstate commerce. *Houston, E. & W. T. Ry. Co. v. U. S.*, 234 U. S. 342, 34 S. Ct. 833, 58 L. Ed. 1341. Plaintiffs ask the Court to superimpose on this a test of comparative percentages. If the local activity (whether or not traditionally described as "commerce") sought to be regulated substantially affects interstate commerce then it is subject to regulation by the Federal Government. *Mandeville Island Farms v. American Crystal Sugar Company*, 334 U. S. 219, 68 S. Ct. 996, 92 L. Ed. 1328; *Wickard v. Filburn*, 317 U. S. 111, 63 S. Ct. 82, 87 L. Ed 122; *U. S. v. Wrightwood Dairy Co.*, *supra*; *U. S. v. Darby*, 312 U. S. 100, 61 S. Ct. 451, 85 L. Ed. 609, 132 A. L. R. 1430. The plaintiffs ask the Court to rule that the activity must not only affect interstate commerce, it must affect a relatively large percentage of interstate commerce.

[3] The contention is untenable. The test is not a comparison of the amounts of intrastate milk and interstate milk. The test is whether the amount of interstate milk sought to be regulated is substantial rather than inconsequential. The maxim "de minimis" urged by the plaintiffs may be applicable in some cases, but not here. One-half of one per cent may be a small figure where comparison is involved, but the annual shipment of 2,303,910 pounds of milk represented thereby is not a "de minimis" situation.

Judicial authority has not been receptive to determining constitutional question on †[121] a percentage basis. See *Mabee v. White Plains Publishing Co., Inc.*, 327 U. S. 178, 66 S. Ct. 511, 90 L. Ed. 607; *Connecticut Light & Power Co. v. Federal Power Commission*, 324 U. S. 515, 65 S. Ct. 749, 89 L. Ed. 1150; *N. L. R. B. v. Fainblatt*, 306 U. S. 601, 59 S. Ct. 668, 83 L. Ed. 1014. Especially note *Beatrice Creamery Co. v. Anderson, D. C.*, 75 F. Supp. 363, where a similar order was under attack. This is but another illustration of the return of constitutional doctrine to the early view of Chief Justice Marshall who " \* \* \* described the federal commerce power with a breadth never yet exceeded. *Gibbons v. Ogden*, 9 Wheat. 1, 194-195, 6 L. Ed. 23. He made emphatic the embracing and penetrating nature of this

† Italic figures in brackets refer to page in 87 F. Supp. 119.—Ed.

power by warning that effective restraints on its exercise must proceed from political rather than from judicial processes." *Wickard v. Filburn*, 317 U. S. 111, 120, 63 S. Ct. 82, 87, 87 L. Ed. 122. This view has even greater force in a modern, highly complex industrial society where every activity inevitably makes itself felt throughout the entire structure.

This Court finds that Order No. 75 is a valid exercise of authority under a valid statute. The order of the Judicial Officer so finding is in accordance with law.

**UNITED STATES OF AMERICA, APPELLANT v. BORDEN COMPANY, CHARLES L. DRESEL, HARRY M. RESER, et al.**, 308 U. S. 188. Decided December 4, 1939.

### No. 397

#### **Provisions of Federal Anti-Trust Act Not Impliedly Repealed by Agricultural Marketing Agreement Act of 1937**

The provisions of the Federal Anti-Trust Act are not impliedly repealed, as respects agreements between and combinations of producers and distributors of agricultural products, by the provisions of the Agricultural Marketing Agreement Act of 1937 which vests in the Secretary of Agriculture power to regulate the production and marketing in interstate commerce of agricultural products.\*

#### **Provisions of Federal Anti-Trust Act Not Modified by Capper-Volstead Act**

The provisions of the Federal Anti-Trust Act are not modified, so as to exempt a co-operative agricultural organization and its officers and agents from prosecution on a charge of having conspired with other persons in restraint of interstate commerce, by the provisions of the Capper-Volstead Act authorizing producers of agricultural products to act together in collectively processing, preparing for market, handling and marketing in interstate and foreign commerce their products, to have marketing agencies in common, and to make the necessary contracts and agreements to effect such purposes, and committing to the Secretary of Agriculture the power of regulation and visitation where he has reason to believe that any such association monopolizes or restrains interstate trade to such an extent that the price of any agricultural product is unduly enhanced.\*

#### **Court Decisions Distinguished**

**UNITED STATES v. CURTISS-WRIGHT EXPORT CORP.**, 299 U. S. 304 distinguished.\*

Appeal by the United States from a judgment of the District Court of the United States for the Northern District of Illinois sustaining

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\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

demurrers and dismissing an indictment charging combination and conspiracy in violation of the Federal Anti-trust Act. Appeal dismissed in part; judgment reversed in part; and cause remanded for further proceedings.

See same case below, 28 F. Supp. 177.

Assistant Attorney General Thurman Arnold, of Washington, D. C., argued the cause, and, with Solicitor General Jackson, and Special Assistants to the Attorney General Hugh B. Cox, Leo F. Tierney, Thomas J. Lynch, Robert K. McConnaughey, and Maurice L. A. Gellis, also of Washington, D. C., filed a brief for appellant:

This court has jurisdiction under the Criminal Appeals Act.

United States v. Patten, 226 U. S. 525, 57 L. ed. 333, 33 S. Ct. 141, 44 LRA (NS) 325; United States v. Pacific & A. R. & Nav. Co., 228 U. S. 87, 57 L. ed. 742, 33 S. Ct. 443; United States v. A. Schrader's Son, 252 U. S. 85, 64 L. ed. 471, 40 S. Ct. 251; United States v. Kapp, 302 U. S. 214, 82 L. ed. 205, 58 S. Ct. 182; United States v. Celestine, 215 U. S. 278, 54 L. ed. 195, 30 S. Ct. 93; United States v. Barber, 219 U. S. 72, 55 L. ed. 99, 31 S. Ct. 209; United States v. Oppenheimer, 242 U. S. 85, 61 L. ed. 161, 37 S. Ct. 68, 3 ALR 516; United States v. Thompson, 251 U. S. 407, 64 L. ed. 333, 40 S. Ct. 289; United States v. Goldman, 277 U. S. 229, 72 L. ed. 862, 48 S. Ct. 486.

The acts charged in the indictment are illegal under the Sherman Act and are not exempt from its application by reason of the provisions of other statutes.

The Sherman Act by its terms applies to combinations and conspiracies in restraint of interstate commerce in agricultural products, including milk.

United States v. American Tobacco Co., 221 U. S. 106, 55 L. ed. 663, 31 S. Ct. 632; Appalachian Coals v. United States, 288 U. S. 344, 77 L. ed. 825, 53 S. Ct. 471; United States v. Trenton Potteries Co., 273 U. S. 392, 71 L. ed. 700, 47 S. Ct. 377, 50 ALR 989; United States v. Trans-Missouri Freight Assn., 166 U. S. 290, 41 L. ed. 1007, 17 S. Ct. 540; Sugar Inst. v. United States, 297 U. S. 553, 80 L. ed. 859, 56 S. Ct. 629; American Column & Lumber Co. v. United States, 257 U. S. 377, 66 L. ed. 284, 42 S. Ct. 114, 21 ALR 1093; Coronado Coal Co. v. United Mine Workers, 268 U. S. 295, 310, 69 L. ed. 963, 970, 45 S. Ct. 551; Local 167, I. B. T. v. United States, 291 U. S. 293, 78 L. ed. 804, 54 S. Ct. 396; Nash v. United States, 229 U. S. 373, 57 L. ed. 1232, 33 S. Ct. 780; United States v. Patten, 226 U. S. 525, 57 L. ed. 333, 33 S. Ct. 141, 44 LRA (NS) 325; United States v. Kissell, 218 U. S. 601, 54 L. ed. 1168, 31 S. Ct. 124; Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 S. Ct. 276; Live Poultry Dealers' Protective Assn. v. United States (CCA 2d) 4

F. (2d) 840; *United States v. M. Piowaty & Sons* (D. C.), 251 F. 375; *United States v. King* (D. C.) 250 F. 908, (D. C.) 229 F. 275; *United States v. Corn Products Ref. Co.* (D. C.) 234 F. 964; *United States v. Whiting* (D. C.), 212 F. 466; *United States v. Swift* (D. C.), 188 F. 92.

Immunity from the application of the Sherman Act cannot be implied by reference to general legislative policy or to asserted inconsistencies in other statutes but must be expressly granted.

*General Motors Acceptance Corp. v. United States*, 286 U. S. 49, 61, 62, 76 L. ed. 971, 977, 978, 52 S. Ct. 468, 82 ALR 600; *Henderson's Tobacco*, 11 Wall. (U. S.) 652, 656, 657, 20 L. ed. 235, 237, 238; *United States v. Tynen*, 11 Wall. (U. S.) 88, 92, 20 L. ed. 153, 154; *Posadas v. National City Bank*, 296 U. S. 497, 503-505, 80 L. ed. 351, 355, 356, 56 S. Ct. 349; *United States v. Barnes*, 222 U. S. 513, 520, 521, 56 L. ed. 291, 293, 294, 32 S. Ct. 117; *Baltimore Nat. Bank v. State Tax Commission*, 297 U. S. 209, 212, 213, 80 L. ed. 586, 589, 590, 56 S. Ct. 417; *Frost v. Wenie*, 157 U. S. 46, 58, 39 L. ed. 614, 619, 15 S. Ct. 532.

The agricultural legislation, instead of representing a trend against the application of the Sherman Act to agricultural products, shows a positive legislative policy to further both its objectives and its practical enforcement with respect to agricultural products.

*Appalachian Coals v. United States*, 288 U. S. 344, 77 L. ed. 825, 53 S. Ct. 471; *Interstate Circuit v. United States*, 306 U. S. 208, 83 L. ed. 610, 59 S. Ct. 467; *Bend v. Hoyt*, 13 Pet (U. S.) 263, 271, 272, 10 L. ed. 154, 158, 159; *Equitable Life Assur. Soc. v. Clements* (*Equitable Life Assur. Soc. v. Pettus*), 140 U. S. 226, 35 L. ed. 497, 11 S. Ct. 822.

The Capper-Volstead Act does not exempt agricultural co-operative associations from the Sherman Act.

*Frost v. Corporation Commission*, 278 U. S. 515, 541, 542, 73 L. ed. 483, 497, 49 S. Ct. 235; *Loewe v. Lawlor*, 208 U. S. 274, 52 L. ed. 488, 28 S. Ct. 301, 13 Ann. Cas. 815; *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 65 L. ed. 349, 41 S. Ct. 172, 16 ALR 196; *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Asso.*, 274 U. S. 37, 49, 50, 71 L. ed. 916, 921, 922, 47 S. Ct. 522, 54 ALR 791; *United States v. Pacific & A. R. & Nav. Co.* 228 U. S. 87, 57 L. ed. 742, 33 S. Ct. 443; *United States v. Union P. R. Co.*, 226 U. S. 61, 57 L. ed. 124, 33 S. Ct. 53; *United States v. Joint Traffic Asso.*, 171 U. S. 505, 43 L. ed. 259, 19 S. Ct. 25; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 S. Ct. 540.

Mr. Frederick Burnham, of Chicago, Illinois, argued the cause, and, with Messrs. Donald F. McPherson, Cecil I. Crouse, Howard Neitzert, Miles G. Seeley, Louis E. Hart, Irving Herriott, L. Edward

Hart, Jr., Isidore Fried, Herbert B. Fried, and Bernard A. Stol, all of Chicago, Illinois, filed a brief for appellees Borden Company et al.:

The Capper-Volstead Act authorizes the contracts and agreements complained of in counts one, two, and four of the indictment and withdraws the subject matter of those counts from the purview of the Sherman Act.

*Appalachian Coals v. United States*, 288 U. S. 344, 77 L. ed. 825, 53 S. Ct. 471; *United States v. Trenton Potteries Co.* 273 U. S. 392, 71 L. ed. 700, 47 S. Ct. 377, 50 ALR 989; *United States v. Winslow*, 227 U. S. 202, 57 L. ed. 481, 33 S. Ct. 253; *United States v. Pacific & A. R. & Nav. Co.* 228 U. S. 87, 57 L. ed. 742, 33 S. Ct. 443; *United States v. Biggs*, 211 U. S. 507, 53 L. ed. 305, 29 S. Ct. 181; *United States v. Patten*, 226 U. S. 525, 540, 57 L. ed. 333, 340, 33 S. Ct. 141, 44 LRA (NS) 325.

The Sherman Act has been so amended, altered, modified, and restricted by the Capper-Volstead Act as to render it unconstitutional and to deny to these defendants due process of law, in contravention of the Fifth Amendment to the Constitution of the United States.

*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. ed. 679, 22 S. Ct. 431; *United States v. Armstrong* (D. C.) 265 F. 683; *United States v. Yount* (D. C.) 267 F. 861; *Beatrice Creamery Co. v. Cline*, (D. C.) 9 F. (2d.) 176; *Com. v. International Harvester Co.*, 131 Ky. 551, 115, S. W. 703, 133 Am. St. Rep., 256.

The supposed conspiracy described in count two of the indictment does not affect or only indirectly affects interstate commerce.

Interstate commerce ceased upon the delivery of the milk, previously moving in interstate commerce, to the plants of distributors in the City of Chicago.

*Atlantic Coast Line R. Co. v. Standard Oil Co.*, 275 U. S. 257, 267, 72, L. ed. 270, 274, 48 S. Ct. 107; *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 79 L. ed., 1570, 55 S. Ct. 837, 97 ALR 947; *Lipson v. Socony-Vacuum Corp.* (C. C. A. 1st), 76 F. (2d.) 213, 218; *H. P. Hood & Sons v. Com.*, 235 Mass. 572, 127 N. E., 497, 499; *Pennsylvania Gas Co. v. Public Serv. Commission*, 252 U. S. 23, 64 L. ed., 434, 40 S. Ct. 279, PUR1920E 18; *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298, 308, 88 L. ed., 1027, 1030, 44 S. Ct. 544; *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, 471, 75 L. ed., 1171, 1175, 51 S. Ct. 499.

The regulation of purely intrastate transactions in a commodity is only an indirect and remote interference with interstate commerce.

*Public Utilities Commission v. Landon*, 249 U. S. 236, 245, 63 L. ed., 577, 586, 39 S. Ct. 268, PUR1919C 834; *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298, 308, 309, 88 L. ed., 1027, 1030,

1081, 44 S. Ct. 544; *Pennsylvania Gas Co. v. Public Serv. Commission*, 252 U. S. 23, 29, 64 L. ed., 434, 442, 40 S. Ct. 279, PUR1920E 18; *Gulf, C. & S. F. R. Co. v. Texas*, 204 U. S. 403, 51 L. ed., 540, 27 S. Ct. 360; *Atlantic Coast Line R. Co. v. Standard Oil Co.*, 275 U. S. 257, 72 L. ed., 270, 48 S. Ct. 107; *East Ohio Gas Co. v. Tax Commission*, 283 U. S. 465, 470, 472, 75 L. Ed., 1171, 1174, 1175, 51 S. Ct., 499; *Hart Refineries v. Harmon*, 278 U. S. 499, 501, 73 L. ed., 475, 476, 49 S. Ct. 188; *H. P. Hood & Sons v. Com.* 235, Mass., 572, 127 N. E. 497; *Ozark Pipe Line Corp. v. Monier*, 266 U. S. 555, 69 L. ed., 439, 45 S. Ct. 184; *Levering & G. Co. v. Morrin*, 289 U. S. 103, 77 L. ed., 1062, 53 S. Ct. 549; *Industrial Asso. 1. United States*, 268 U. S. 64, 69 L. ed., 849, 45 S. Ct. 403.

The indictment charges no intent to restrain interstate commerce, and any restraint which may have been caused by the acts charged is only incidental, indirect, and remote and not such a restraint as is prohibited by the Sherman Act.

*Levering & G. Co. v. Morrin*, 289 U. S. 103, 77 L. ed. 1062, 53 S. Ct. 549; *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Asso.*, 274 U. S. 37, 71 L. ed. 916, 47 S. Ct. 522, 54 ALR 791; *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, 66 L. ed. 975, 42 S. Ct. 570, 27 ALR 762; *United Leather Workers International Union v. Herkert & M. Trunk Co.*, 265 U. S. 457, 68 L. ed. 1104, 44 S. Ct. 623, 33 ALR 566; *Industrial Asso. v. United States*, 268 U. S. 64, 69 L. ed. 849, 45 S. Ct. 403; *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, 69 L. ed. 963, 45 S. Ct. 551; *United States v. Brims*, 272 U. S. 549, 71 L. ed. 403, 47 S. Ct. 169; *Local 167, I. B. T. v. United States*, 291 U. S. 293, 78 L. ed. 804, 54 S. Ct. 396; *Loewe v. Lawlor*, 208 U. S. 274, 52 L. ed. 488, 28 S. Ct. 301, 13 Ann. Cas. 815; *Boyle v. United States (CCA 7th)* 259 F. 803; *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 547, 79 L. ed. 1570, 1589, 55 S. Ct. 837, 97 ALR 947; *United States v. Colgate & Co.*, 250 U. S. 300, 63 L. ed. 992, 39 S. Ct. 465, 7 ALR 443; *Pettibone v. United States*, 148 U. S. 197, 37 L. ed. 419, 13 S. Ct. 542; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 248, 44 L. ed. 136, 150, 20 S. Ct. 96.

Count four fails to demonstrate any restraint on interstate commerce.

*International Harvester Co. v. Kentucky*, 234 U. S. 216, 58 L. ed. 1284, 34 S. Ct. 853; *United States v. L. Cohen Grocery Co.* 255 U. S. 81, 65 L. ed. 516, 41 S. Ct. 298, 14 ALR 1045; *United States v. Trenton Potteries Co.*, 273 U. S. 392, 71 L. ed. 700, 47 S. Ct. 377, 50 ALR 989.

The unsupported conclusion of a restraint shows restraint (if any) of production, not of commerce, and any effect that it might have on commerce would be remote, indirect, and secondary.

United Leather Workers International Union v. Herkert & M. Trunk Co., 265 U. S. 457, 471, 68 L. ed. 1104, 1109, 44 S. Ct. 623, 33 ALR 566; United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 66 L. ed. 975, 42 S. Ct. 570, 27 ALR 762; United States v. Butler, 297 U. S. 1, 80 L. ed. 477, 56 S. Ct. 312, 102 ALR 914.

Mr. Loy N. McIntosh, of Chicago, Illinois, argued the cause, and, with Messrs. Bernhardt Frank and Frederick Secord, also of Chicago, Illinois, filed a brief for appellees Sidney Wanzer & Sons, Inc., et al.

Mr. William C. Graves, of Chicago, Illinois, argued the cause, and, with Messrs. Edward J. Hennessy, Harvey E. Wood, Martin Burns, C. Ernest Heaton, and Daniel M. Schuyler, also of Chicago, Illinois, filed a brief for appellees Pure Milk Association et al.

Mr. Joseph A. Padway, of Milwaukee, Wisconsin, argued the cause, and, with Messrs. David A. Riskind and Abraham W. Brussell, both of Chicago, Illinois, filed a brief for appellees Robert G. Fitchie et al.

Mr. Daniel D. Carmell, of Chicago, Illinois, submitted the cause for appellee Leslie G. Goudie.

Messrs. Charles S. Deneen, Roy Massena, and Donald N. Schaffer, all of Chicago, Illinois, submitted the cause for appellees Hunding Dairy Company et al.

Messrs. Ben H. Matthews, and James P. Dillie, both of Chicago, Illinois, submitted the cause for appellee Leland Spencer.

Mr. Louis M. Mantynband, of Chicago, Illinois, submitted the cause for appellees Western United Dairy Company et al., upon and by their adoption of the brief filed on behalf of appellees Sidney Wanzer & Sons, Inc., et al.

Mr. Chief Justice Hughes delivered the opinion of the Court:

The Government appeals from a judgment of the District Court sustaining demurrers and dismissing an indictment charging combination and conspiracy in violation of § 1 of the Sherman Anti-trust Act. 28 F. Supp. 177.

\*[191] The trade and commerce alleged to be involved is the transportation to the Chicago market of fluid milk produced on dairy farms in Illinois, Indiana, Michigan and Wisconsin and the distribution of the milk in that market. The Government divides the defendants into five groups,—(1) distributors and allied groups which include a number of corporations described as major distributors and their officers and agents, the Associated Milk Dealers, Inc., a trade association of milk distributors, and its officers and agents, and the Milk Dealers Bottle Exchange, a corporation controlled by the major distributors; (2) the Pure Milk Association, a cooperative association of milk producers incorporated in Illinois, and its officers and agents;

\*Figures in brackets refer to page in 308 U. S. 188.—Ed.



(3) the Milk Wagon Drivers Union, Local 753, engaged in the distribution of milk in Chicago, and certain labor officials; (4) municipal officials, including the president of the Board of Health of Chicago and certain subordinate officials; (5) two persons who arbitrated a dispute between the major distributors and the Pure Milk Association, fixing the price of milk to be paid to the members of the association.

The indictment, which was filed in November, 1938, contains four counts. The several defendants challenged it by demurrers and motions to quash on various grounds. The District Court held with respect to counts one, two and four, that the production and marketing of agricultural products, including milk, are removed from the purview of the Sherman Act by the Agricultural Marketing Agreement Act of [June 3] 1937 (50 Stat. at L. 246, chap. 296); also with respect to all four counts, according to the formal terms of its judgment, that the Pure Milk Association, as an agricultural cooperative association, its officers and agents, are exempt from prosecution under Section one of the Sherman Act by § 6 of the Clayton Act (15 U. S. C. A. § 17), Sections one and two of the Capper-Volstead Act (7 U. S. C. A. §§ 291, \*[192] 292), and the Agricultural Marketing Agreement Act. With respect to count three, the District Court held that it was duplicitous, in the view that it charged several separate conspiracies and also that it did not definitely charge a restraint of interstate commerce.

The judgment expressly overruled the demurrers and motions to quash so far as they challenged the constitutionality of the Sherman Act or the sufficiency of the allegations of unlawful conspiracy, and also so far as it was contended that interstate commerce was not involved in counts one, two and four. The court added that it overruled all the defendants' contentions which it had not specifically overruled or sustained. The judgment ends by dismissing the indictment as to all defendants.

The first question presented concerns our jurisdiction. The exceptional right of appeal given to the Government by the Criminal Appeals Act is strictly limited to the instances specified.<sup>1</sup> The provision

\*Figures in brackets refer to page in 308 U. S. 188.—Ed.

<sup>1</sup> This Act (18 U. S. C. A. § 682; [see also Judicial Code, § 238, 28 U. S. C. A. § 345]) provides:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:

"From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

invoked here is the \*[193] one which permits review where a decision quashing or sustaining a demurrer to an indictment or any of its counts is based upon the "construction of the statute upon which the indictment is founded." The decision below was not predicated upon invalidity of the statute.

The established principles governing our review are these: (1) Appeal does not lie from a judgment which rests on the mere deficiencies of the indictment as a pleading, as distinguished from a construction of the statute which underlies the indictment. (2) Nor will an appeal lie in a case where the District Court has considered the construction of the statute but has also rested its decision upon the independent ground of a defect in pleading which is not subject to our examination. In that case we cannot disturb the judgment and the question of construction becomes abstract. (3) This Court must accept the construction given to the indictment by the District Court as that is a matter we are not authorized to review. (4) When the District Court holds that the indictment, not merely because of some deficiency in pleading but with respect to the substance of the charge, does not allege a violation of the statute upon which the indictment is founded, that is necessarily a construction of that statute. (5) When the District Court has rested its decision upon the construction of the underlying statute this Court is not at liberty to go beyond the question of the correctness of that construction and consider other objections to the indictment. The Government's appeal does not open the whole case.

First. The first two of these principles, as the Government concedes, preclude our review of the decision below as to count three. For that count was held bad upon the independent ground that it is defective as a pleading, being duplicitous and also lacking in definiteness. *United States v. Keitel*, 211 U. S. 370, 397-399, 53 L. ed. 230, 244, 245, 29 S. Ct. 123; *United States v. \*[194] Carter*, 231 U. S. 492, 493, 58 L. ed. 330, 331, 34 S. Ct. 173; *United States v. Hastings*, 296 U. S. 188, 192-194, 80 L. ed. 148, 150, 151, 56 S. Ct. 218. The appeal as to count three must be dismissed.

Second. After a general description of the averments of the indictment, which was explicitly founded on § 1 of the Sherman Act, the District Court construed counts one, two and four as follows:

"Count 1 charges a conspiracy 'to arbitrarily fix, maintain and control artificial and non-competitive prices to be paid to all producers by all distributors for all fluid milk produced on approved dairy farms

Footnote 1—Continued.

"From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy. . . .

"Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided*, That no appeal shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant."

\*Figures in brackets refer to page in 308 U. S. 188.—Ed.

located in the states of Illinois, Indiana, Michigan and Wisconsin,' and shipped to Chicago."

"Count 2 charges a conspiracy 'to fix and maintain by common and concerted action, uniform, arbitrary and non-competitive prices for the sale by the distributors in the city of Chicago of fluid milk shipped into the said city from the states of Illinois, Indiana, Michigan, and Wisconsin.' "

"Count 4 charges a conspiracy 'to restrict, limit and control and to restrain and obstruct the supply of fluid milk moving in the channels of interstate commerce into the city of Chicago from the states of Illinois, Indiana, Michigan and Wisconsin.' "

The District Court further summarized the allegations in these counts as to the methods by which the alleged conspiracies were intended to be effected. 28 F. Supp. pp. 179-181. This construction of the indictment is binding upon this Court on this appeal. *United States v. Patten*, 226 U. S. 525, 535, 540, 57 L. ed. 338-340, 33 S. Ct. 141, 44 LRA (NS) 325; *United States v. Colgate & Co.* 250 U. S. 300, 301, 63 L. ed. 992, 994, 39 S. Ct. 465, 70 ALR 443; *United States v. A. Schrader's Son*, 252 U. S. 85, 98, 64 L. ed. 471, 475, 40 S. Ct. 251; *United States v. Yuginovich*, 256 U. S. 450, 461, 65 L. ed. 1043, 1046, 41 S. Ct. 551; *United States v. Hastings*, *supra* (296 U. S. 192, 80 L. ed. 150, 56 S. Ct. 218).

Third. The District Court, thus construing counts one, two and four, held as a matter of substance that, because \*[195] of the effect of the later statutes, these counts did not charge an offense under § 1 of the Sherman Act. This was necessarily a construction of the Sherman Act. *United States v. Patten*, *supra*; *United States v. Bird-sall*, 233 U. S. 223, 230, 58 L. ed. 930, 933, 34 S. Ct. 512; *United States v. Kapp*, 302 U. S. 214, 217, 82 L. ed. 205, 207, 58 S. Ct. 182. We are not impressed with the argument that the court simply construed the later statutes. The effect of those statutes was considered in determining whether the Sherman Act has been so modified and limited that it no longer applies to such combinations and conspiracies as are charged in counts one, two and four. Thus the Sherman Act was not the less construed because it was construed in the light of the subsequent legislation.

We have jurisdiction under the Criminal Appeals Act to determine whether the construction thus placed upon the Sherman Act is correct.

Fourth. In reaching its conclusion, the District Court referred to § 6 of the Clayton Act, §§ 1 and 2 of the Capper-Volstead Act, and the Agricultural Adjustment Act of [May 12] 1933, as amended in [August 24] 1935, and as reenacted and amended by the Agricultural Marketing Agreement Act of [June 3] 1937.

\*Figures in brackets refer to page in 308 U. S. 188.—Ed.

With respect to the Clayton Act,<sup>2</sup> the court said in its opinion: "By that act labor, agricultural or horticultural cooperative organizations were excepted from the \*[196] broad and sweeping terms of the Sherman Act. Such cooperative organizations, in and of themselves, were not to be construed as illegal combinations or conspiracies in restraint of trade under the anti-trust laws." 28 F. Supp. 183. But the court did not hold that, by these provisions of the Clayton Act, either the defendants Pure Milk Association and its officers and agents or the defendants Milk Wagon Drivers Union, Local 753, and its officials (albeit these organizations were not in themselves illegal combinations or conspiracies) were rendered immune from prosecution under the Sherman Act for their alleged participation in the combinations and conspiracies charged in counts one, two and four of the indictment. The Sherman Act was not construed by the District Court as having been limited to that extent by the Clayton Act.

The court invoked the Capper-Volstead Act,<sup>3</sup> as its judgment shows, only in relation to certain defendants, that is, the Pure Milk Association, an agricultural cooperative organization, and its officers and agents. We shall consider later the effect of that statute upon the charge against those defendants.

The court dismissed the indictment as to *all* defendants, and we think it manifests that this ruling in its bearing upon counts one, two and four was due to the effect upon the Sherman Act which the court attributed to the Agricultural Marketing Agreement Act.<sup>4</sup>

(1). As to that Act, the court said:

"The Court holds that, by the Agricultural Marketing Agreement Act the Congress has committed to the Executive \*[197] Department, acting through the Secretary of Agriculture, full, complete, and plenary power over the production and marketing, in interstate commerce, of agricultural products, including milk.

"To what extent he should act, the quantum of regulation is solely one for his judgment and decision. If conditions require, he must act;

<sup>2</sup> Section 6 of the Clayton Act (38 Stat. at L. 730, chap. 323, 15 U. S. C. A. § 17) provides:

"The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

<sup>3</sup> [February 22, 1922] 42 Stat. at L. 388, chap. 57, 7 U. S. C. A. §§ 291, 292.

<sup>4</sup> The District Court referred, in passing, to the Cooperative Marketing Act of July 2, 1926 (44 Stat. at L. 803, chap. 725, 7 U. S. C. A. § 455), and to the provisions of the Agricultural Adjustment Act of 1933 (48 Stat. at L. 31, chap. 25), as amended in [August 24] 1935 (49 Stat. at L. 750, chap. 641), which was followed by the Agricultural Marketing Agreement Act of 1937 (50 Stat. at L. 246, chap. 296).

<sup>5</sup> Figures in brackets refer to page in 308 U. S. 188.—Ed.

if they do not require action, then all marketing conditions are deemed satisfactory and the purpose of the act is effectuated. Non-action by the Secretary of Agriculture, in any given marketing area, is equivalent to a declaration that the policy of the act, in that area, is being carried out. If the policy of the act, in any given milk area, is being violated it becomes the duty of the Secretary of Agriculture to intervene and invoke the powers conferred upon him by the act.

"It results, from what has been said, that the power of regulation, supervision and control of the milk industry, in any given milk shed, is, by the Agricultural Marketing Agreement Act of 1937, vested exclusively in the Secretary of Agriculture. It follows further that the Secretary of Agriculture cannot by his own action, or inaction, divest himself of this power so long as the statute remains in force. The marketing of the agricultural products, including milk, covered by the Agricultural Marketing Agreement Act, is removed from the purview of the Sherman Act. In other words, so far as the marketing of agricultural commodities, including milk, is concerned, no indictment will lie under § 1 of the Sherman Act." 28 F. Supp. p. 187.

It will be observed that the District Court attributes this effect to the Agricultural Marketing Agreement Act per se, that is, to its operation in the absence, and without regard to the scope and particular effect, of any marketing agreements made by the Secretary of Agriculture or of any orders issued by him pursuant to the Act. In the opinion of the court below, the existence of the authority \*[198] vested in the Secretary of Agriculture, although unexercised, wholly destroys the operation of § 1 of the Sherman Act with respect to the marketing of agricultural commodities.

We are of the opinion that this conclusion is erroneous. No provision of that purport appears in the Agricultural Act. While effect is expressly given, as we shall see, to agreements and orders which may validly be made by the Secretary of Agriculture, there is no suggestion that in their absence, and apart from such qualified authorization and such requirements as they contain, the commerce in agricultural commodities is stripped of the safeguards set up by the Anti-trust Act and is left open to the restraints, however unreasonable, which conspiring producers, distributors and their allies may see fit to impose. We are unable to find that such a grant of immunity by virtue of the inaction, or limited action, of the Secretary has any place in the statutory plan. We cannot believe that Congress intended to create "so great a breach in historic remedies and sanctions."<sup>5</sup>

It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject,

<sup>5</sup> See *General Motors Acceptance Corp. v. United States*, 286 U. S. 49, 61, 76 L. ed. 971, 977, 52 S. Ct. 468, 82 A. L. R. 600.

\*Figures in brackets refer to page in 308 U. S. 188.—Ed.

the rule is to give effect to both if possible. *United States v. Tynen*, 11 Wall. 88, 92, 20 L. ed. 153, 154; *Henderson's Tobacco*, 11 Wall. 652, 657, 20 L. ed. 235, 237; *General Motors Acceptance Corp. v. United States*, 286 U. S. 49, 61, 62, 76 L. ed. 971, 977, 978, 52 S. Ct. 468, 82 ALR 600. The intention of the legislature to repeal "must be clear and manifest." *Red Rock v. Henry*, 106 U. S. 596, 601, 602, 27 L. ed. 251, 253, 1 S. Ct. 434. It is not sufficient, as was said by Mr. Justice Story in *Wood v. United States*, 16 Pet. 342, 362, 363, 10 L. ed. 987, 995, "to establish that subsequent laws cover some or even all of the cases provided for by [the prior act]; for they may be merely affirmative, or cumulative, or auxiliary." There \*[199] must be "a positive repugnancy between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only pro tanto to the extent of the repugnancy." See also *Posadas v. National City Bank*, 296 U. S. 497, 504, 80 L. ed. 351, 355, 56 S. Ct. 349.

The Sherman Act is a broad enactment prohibiting unreasonable restraints upon interstate commerce, and monopolization or attempts to monopolize, with penal sanctions. The Agricultural Act is a limited statute with specific reference to particular transactions which may be regulated by official action in a prescribed manner. The Agricultural Act \* declares it to be the policy of Congress "through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural communities in the base period" described. To carry out that policy a particular plan is set forth. Farmers and others are not permitted to resort to their own devices and to make any agreements or arrangements they desire, regardless of the restraints which may be inflicted upon commerce. The statutory program to be followed under the Agricultural Act requires the participation of the Secretary of Agriculture who is to hold hearings and make findings. The obvious intention is to provide for what may be found to be reasonable arrangements in particular instances and in the light of the circumstances disclosed. The methods which the Agricultural Act permits to attain that result are twofold, marketing agreements and orders. To give validity to marketing agreements the Secretary must be an \*[200] actual party to the agreements. Section 8b.<sup>7</sup> The orders are also to be made by

\* 7 U. S. C. Supp. IV, § 602 (1), 7 U. S. C. A. § 602 (1).

<sup>7</sup> 7 U. S. C. Supp. IV, § 608b, 7 U. S. C. A. § 608b.

\* Figures in brackets refer to page in 308 U. S. 188.—Ed.

the Secretary for the purpose of regulating the handling of the agricultural commodity to which the particular order relates. Section 8c (3) (4).<sup>8</sup> That the field covered by the Agricultural Act is not coterminous with that covered by the Sherman Act is manifest from the fact that the former is thus delimited by the prescribed action participated in and directed by an officer of government proceeding under the authority specifically conferred by Congress. As to agreements and arrangements not thus agreed upon or directed by the Secretary, the Agricultural Act in no way impinges upon the prohibitions and penalties of the Sherman Act, and its condemnation of private action in entering into combinations and conspiracies which impose the prohibited restraint upon interstate commerce remains untouched.

It is not necessary to labor the point, for the Agricultural Act itself expressly defines the extent to which its provisions make the anti-trust laws inapplicable. That definition is found in § 8 (b)<sup>9</sup> of the Agricultural Adjustment Act carried into the Agricultural Marketing Agreement Act in relation to marketing agreements, and provides as follows:

"In order to effectuate the declared policy of this chapter, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects interstate or foreign commerce in \*[201] such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the anti-trust laws of the United States, and any such agreement shall be deemed to be lawful: Provided, That no such agreement shall remain in force after the termination of this chapter."

Another provision is found in § 3 (d)<sup>10</sup> of the Agricultural Marketing Agreement Act, relating to awards or agreements resulting from the arbitration or mediation by the Secretary of Agriculture or by a designated officer or employee of the Department of Agriculture as provided in § 3 (a),<sup>11</sup> and meetings for that purpose and awards or agreements resulting therefrom which have been approved by the Secretary of Agriculture as provided in § 3 (b).<sup>12</sup> Section 3 (d) provides:

<sup>8</sup> 7 U. S. C. Supp. IV, § 608c (3) (4), 7 U. S. C. A. § 608c (3) (4).

<sup>9</sup> 7 U. S. C. Supp. IV, § 608b, 7 U. S. C. A. § 608b.

<sup>10</sup> 50 Stat. at L. 249, chap. 296, 7 U. S. C. Supp. IV, § 671 (d), 7 U. S. C. A. § 671 (d).

<sup>11</sup> 50 Stat. at L. 248, chap. 296.

<sup>12</sup> 50 Stat. at L. 248, chap. 296.

\*Figures in brackets refer to page in 308 U. S. 188.—Ed.

"No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the anti-trust laws of the United States."

These explicit provisions requiring official participation and authorizations show beyond question how far Congress intended that the Agricultural Act should operate to render the Sherman Act inapplicable.<sup>13</sup> If Congress had desired to grant any further immunity, Congress doubtless would have said so.

An agreement made with the Secretary as a party, or an order made by him, or an arbitration award or agreement approved by him, pursuant to the authority conferred by the Agricultural Act and within the terms of the described immunity, would of course be a defense to a prosecution under the Sherman Act to the extent that the prosecution sought to penalize what was thus validly \*[202] agreed upon or directed by the Secretary. Further than that the Agricultural Act does not go.

We have no occasion to decide whether in any particular case an indictment under the Sherman Act by reason of its particular terms would be subject to demurrer, or to a motion to quash, upon the ground that the indictment ran against the provisions of such an agreement or order. We have no such situation here. There is indeed a contention that there was a license (No. 30) issued by the Secretary of Agriculture in 1934, amended in January, 1935, and in force until March 2, 1935, which related to the marketing of milk in the Chicago area, and hence that defendants operating under that license were not subject to the charges of the conspiracies alleged to have begun in January, 1935. But the allegations of the indictment are that the unlawful conspiracies continued throughout all the period mentioned in the indictment, that is, up to the time of its presentment in November, 1938. This clearly imports that the conspiracies were operative after the license came to an end and thus in the absence of any license. A conspiracy thus continued is in effect renewed during each day of its continuance. *United States v. Kissel*, 218 U. S. 601, 607, 608 54 L. ed. 1168, 1178, 31 S. Ct. 124; *Hyde v. United States*, 225 U. S. 347, 369, 56 L. ed. 1114, 1127, 32 S. Ct. 793, Ann. Cas. 1914A, 614; *Brown v. Elliott*, 225 U. S. 392, 400, 56 L. ed. 1136, 1140, 32 S. Ct. 812. It is also said that there is a recent marketing order under date of August 29, 1939,<sup>14</sup> which relates to the Chicago marketing area, and hence that this cause is moot. But that order affects a period subsequent to the time covered by the indictment. These contentions are unavailing in relation to the question before us.

<sup>13</sup> See 77 Cong. Rec., Pt. II, p. 1877; Pt. III, p. 8117.

<sup>14</sup> Federal Register, August 30, 1939, Order No. 41, vol. 4, pp. 3764-3768, 3770.

\*Figures in brackets refer to page in 308 U. S. 188.—Ed.



Our conclusion is that the Agricultural Adjustment Act as reenacted and amended by the Agricultural Marketing Agreement Act affords no ground for construing \*[203] the Sherman Act as inapplicable to the charges contained in counts one, two and four.

(2). There remains the question whether the court below rightly held that the Capper-Volstead Act<sup>15</sup> had modified the Sherman Act so as to exempt the Pure Milk Association, a cooperative agricultural organization, and its officers and agents, from prosecution under these counts.

As to the Capper-Volstead Act the Court said:

"This Act legalizes price fixing for those within its purview. To that extent it modifies the Sherman Act. It removes from the Sherman Act those organizations, cooperative in their nature, which come within the purview of the Capper-Volstead Act. Prior to the Capper-Volstead Act farmers were treated no differently than others under the anti-trust laws, so far as price fixing was concerned. . . .

"The Capper-Volstead Act does not condemn any kind of monopoly or restraint of trade, or any price fixing, unless such monopoly or price fixing unduly enhances the price of an agricultural product. The Act then, by § 2 thereof, commits to an officer of the executive department, the Secretary of Agriculture, the power of regulation and visitation.

"Under this act farmers are favored under the anti-trust laws in that they are given a qualified right, free from any criminal liability, to combine among themselves to monopolize and restrain interstate trade and commerce in farm products and to fix and enhance the price thereof.

". . . The court deduces from the Capper-Volstead Act that the Secretary of Agriculture has exclusive jurisdiction to determine and order, in the first instance, whether or not farmer cooperatives, in their operation, monopolize and restrain interstate trade and commerce \*[204] 'to such an extent that the price of any agricultural product is unduly enhanced.' Until the Secretary of Agriculture acts, the judicial power cannot be invoked." 28 F. Supp. pp. 183, 184.

We are unable to accept that view. We cannot find in the Capper-Volstead Act, any more than in the Agricultural Act, an intention to declare immunity for the combinations and conspiracies charged in the present indictment. Section 6 of the Clayton Act, enacted in 1914,<sup>16</sup> had authorized the formation and operation of agricultural organizations provided they did not have capital stock or were conducted for profit, and it was there provided that the anti-trust laws

<sup>15</sup> 42 Stat. at L. 388, chap. 57, 7 U. S. C. A. §§ 291, 292.

<sup>16</sup> 38 Stat. at L. 781, chap. 323, 15 U. S. C. A. § 17.

\*Figures in brackets refer to page in 308 U. S. 188.—Ed.

should not be construed to forbid members of such organizations "from lawfully carrying out the legitimate objects thereof." They were not to be held illegal combinations. The Capper-Volstead Act, enacted in 1922,<sup>17</sup> was made applicable as well to cooperatives having capital stock. The persons to whom the Capper-Volstead Act applies are defined in Section one as producers of agricultural products, "as farmers, planters, ranchmen, dairymen, nut or fruit growers." They are authorized to act together "in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce" their products. They may have "marketing agencies in common," and they may make "the necessary contracts and agreements to effect such purposes."

The right of these agricultural producers thus to unite in preparing for market and in marketing their products, and to make the contracts which are necessary for that collaboration, cannot be deemed to authorize any combination or conspiracy with other persons in restraint of \*[205] trade that these producers may see fit to devise. In this instance, the conspiracy charged is not that of merely forming a collective association of producers to market their products but a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others, in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk produced in Illinois and neighboring States and marketed in the Chicago area, and thus in effect, as the indictment is construed by the court below, "to compel independent distributors to exact a like price from their customers" and also to control "the supply of fluid milk permitted to be brought to Chicago." 28 F. Supp. 180-182. Such a combined attempt of all the defendants, producers, distributors and their allies, to control the market finds no justification in Section one of the Capper-Volstead Act.

Nor does the court below derive its limitation of the Sherman Act from Section one. The pith of the court's conclusion is that under Section two an exclusive jurisdiction with respect to the described cooperative associations is vested, in the first instance, in the Secretary of Agriculture, and that, until the Secretary acts, the judicial power to entertain a prosecution under the Sherman Act cannot be invoked. Section two of the Capper-Volstead Act does provide a special procedure in a case where the Secretary of Agriculture has reason to believe that any such association "monopolizes" or restrains interstate trade "to such an extent that the price of any agricultural product is unduly enhanced." Thereupon the Secretary is to serve upon the association

<sup>17</sup> 42 Stat. at L. 388, chap. 57, 7 U. S. C. A. § 291.

\*Figures in brackets refer to page in 308 U. S. 188.—Ed.

a complaint, stating his charge with notice of hearing. And if upon such hearing the Secretary is of the opinion that the association "monopolizes," or does restrain interstate trade to the extent above mentioned, he then is to issue an order directing \*[206] the association "to cease and desist" therefrom. Provision is made for judicial review.

We find no ground for saying that this limited procedure is a substitute for the provisions of the Sherman Act, or has the result of permitting the sort of combinations and conspiracies here charged unless or until the Secretary of Agriculture takes action. That this provision of the Capper-Volstead Act does not cover the entire field of the Sherman Act is sufficiently clear. The Sherman Act authorizes criminal prosecutions and penalties. The Capper-Volstead Act provides only for a civil proceeding. The Sherman Act hits at attempts to monopolize as well as actual monopolization. And Section two of the Capper-Volstead Act contains no provision giving immunity from the Sherman Act in the absence of a proceeding by the Secretary. We think that the procedure under Section two of the Capper-Volstead Act is auxiliary and was intended merely as a qualification of the authorization given to cooperative agricultural producers by Section one, so that if the collective action of such producers, as there permitted, results in the opinion of the Secretary in monopolization or unduly enhanced prices, he may intervene and seek to control the action thus taken under Section one. But as Section one cannot be regarded as authorizing the sort of conspiracies between producers and others that are charged in this indictment, the qualifying procedure for which Section two provides is not to be deemed to be designed to take the place of, or to postpone or prevent, prosecution under Section one of the Sherman Act for the purpose of punishing such conspiracies.

Fifth. Having dealt with the construction placed by the court below upon the Sherman Act, our jurisdiction on this appeal is exhausted. We are not at liberty to consider other objections to the indictment or questions which may arise upon the trial with respect to the merits \*[207] of the charge. For it is well settled that where the District Court has based its decision on a particular construction of the underlying statute, the review here under the Criminal Appeals Act is confined to the question of the propriety of that construction. *United States v. Keitel*, 211 U. S. 370, 53 L. ed. 230, 29 S. Ct. 123, *supra*; *United States v. Kissel*, 218 U. S. 606, 54 L. ed. 1178, 31 S. Ct. 124, *supra*; *United States v. Miller*, 223 U. S. 599, 602, 56 L. ed. 568, 569, 32 S. Ct. 323; *United States v. Carter*, 231 U. S. 492, 58 L. ed. 330, 34 S. Ct. 173, *supra*; *United States v. Colgate & Co.*, 250 U. S. 300, 63 L. ed. 992, 3 S. Ct. 465, 7 A. L. R. 443, *supra*; *United States v. Shra-*

\*Figures in brackets refer to page in 308 U. S. 188.—Ed.

der's Son, 252 U. S. 85, 64 L. ed. 471, 40 S. Ct. 251, *supra*; *United States v. Hastings*, 296 U. S. 188, 80 L. ed. 148, 56 S. Ct. 218, *supra*. The case of *United States v. Curtiss-Wright Export Corp.* 299 U. S. 304, 81 L. ed. 255, 57 S. Ct. 216, is not opposed, as there the decision of the District Court was not based upon a particular construction of the underlying statute, but upon its invalidity, and the jurisdiction of this Court extended to the consideration of the rulings of the District Court which dealt with that question.

The limitation applicable in the instant case to the question of the District Court's construction of the Sherman Act disposes of the contention urged by some of the defendants that counts two and four do not show such a direct restraint upon interstate commerce as to bring the acts charged within the statute. The District Court said in its opinion that, in view of its rulings (above discussed) as to counts one, two and four, it was unnecessary to decide "whether or not the allegations of the indictment show that interstate commerce was or was not restrained." 28 F. Supp., p. 187. In its judgment the court formally overruled all objections to these counts so far as the objections rested on the ground that interstate commerce was not involved. If these rulings be treated as dealing merely with the construction of the indictment, they must be accepted here. *United States v. Patten*, 226 U. S. 525, 57 L. ed. 333, 33 S. Ct. 141, 44 L. R. A. (N. S.) 325, *supra*; *United States v. Colgate & Co.*, 250 U. S. 300, 63 L. ed. 992, 39 S. Ct. 465, 7 A. L. R. 443, *supra*; *United States v. Hastings*, 296 U. S. 188, 80 L. ed. 148, 56 S. Ct. 218, *supra*. But, apart from that, the District Court certainly has not construed the Sherman \*<sup>[208]</sup> Act as inapplicable upon the ground that interstate commerce is not involved, and the question of the bearing upon that commerce of the acts charged is not before us.

Similarly, the contention of the defendants who are labor officials that the Sherman Act does not apply to labor unions or labor union activities is not open on this appeal. The District Court did not construe the Sherman Act as inapplicable to these defendants and the Government's appeal, under the restriction of the Criminal Appeals Act, does not present that question.

The appeal as to count three is dismissed. The judgment is reversed as to counts one, two and four, and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

It is so ordered.

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\*Figures in brackets refer to page in 308 U. S. 188.—Ed.

HARCOURT-GREENE CO. v. PENNSYLVANIA MACARONI CO., 82 F. Supp. 488.\* Decided February 23, 1949.

UNITED STATES DISTRICT COURT, W. D. PENNSYLVANIA

Civil Action No. 6459

**Contract of Purchase and Sale—Effect of Failure to Comply with Statute of Frauds—Evidence—Failure to Show Breach of Contract**

On an appeal from a reparation order of the Judicial Officer, under the Perishable Agricultural Commodities Act, 1930, the district court, after hearing de novo, held that the evidence did not justify the buyer's refusal to accept the tendered carload of garlic on the ground that it was not of the kind and quality ordered, but, since the carload of garlic, purchased under an oral agreement, was worth more than \$500.00, none of which was accepted by the buyer, the agreement was not enforceable under the Pennsylvania Statute of Frauds, in the absence of payment of anything in earnest to bind the contract, or in part payment, or any written memorandum of agreement signed by the buyer.\*\*

†[488] Proceeding under Perishable Agricultural Commodities Act, § 1 et seq., as amended, 7 U. S. C. A. § 499a et seq., by Walter L. Harcourt, doing business as Harcourt-Greene Co., against Pennsylvania Macaroni Co. for damages resulting from respondent's refusal to accept a carload of garlic allegedly purchased from complainant. On appeal from reparation order.

Judgment in favor of respondent.

Veto J. Rich, of Pittsburgh, Pa., for complainant.

Gilbert E. Morcroft, of Pittsburgh, Pa., for respondent.

McVICAR, *District Judge*.

This is an appeal from a reparation order under the Perishable Agricultural Commodities Act, 7 U. S. C. A. § 499a et seq. The Court, after hearing, makes the following Findings of Fact and Conclusions of Law:

**FINDINGS OF FACT**

1. Complainant is an individual, Walter L. Harcourt, doing business as Harcourt-Greene Co., whose address is 210 California Street, San Francisco, California.

2. Respondent is a corporation, Pennsylvania Macaroni Co., Inc., whose address is 2010-12 Penn Avenue, Pittsburgh, Pennsylvania. At all times mentioned in the pleadings, respondent was licensed under the act and is now so licensed.

3. On or about September 5, 1944, complainant sold to respondent, by oral contract confirmed by complainant in writing, in the course of

\*6 A. D. 253 (1947).—Ed.

\*\*Reference to other points involved in this case will be found in Index-Digest and Subject-Index in this issue of Agriculture Decisions.—Ed.

† Italic figures in brackets refer to page in 82 F. Supp. 488.—Ed.

interstate commerce, one carload of California Late Hard White San Juan Garlic, 85% U. S. No. 1, f. o. b. California shipping point, at 26½ cents per pound, "U. S. Department of Agriculture Inspection Certificate final evidence of quality to be attached to draft."

4. On or about September 8, 1944, complainant and respondent agreed to an amendment of the contract, reducing the price of the garlic to 25 cents per pound.

5. In the negotiation of the contract and its subsequent amendment, G. De Stefano & Son, Pittsburgh, Pennsylvania, acted as an agent of both complainant and respondent.

6. On September 9, 1944, complainant shipped to respondent, in car PFE 75263, garlic of the kind and in the quantity called for by the contract, which was tendered to respondent at Pittsburgh, Pennsylvania, and refused by respondent. This garlic graded at least 83% U. S. No. 1, and may have graded higher.

7. Complainant resold the shipment for the net sum of \$5,661.47, which, deducted from the reduced contract price to respondent, or \$7,435, resulted in a net loss to complainant of \$1,773.53, no part of which has been paid by respondent.

8. The informal complaint was filed on September 29, 1944, which was within nine months after the cause of action accrued.

### CONCLUSIONS OF LAW

1. The contract in this case is not enforceable under the applicable section of †[489] the Statute of Frauds. Pennsylvania Act of Assembly of 1915, P. L. 543, 69 P. S. § 42.

2. Judgment should be entered in favor of the respondent.

### OPINION

[1] Respondent contends that judgment should be entered in its favor for the following reasons:

"(a) The garlic in said car was not late long-keeping quality.

"(b) The minimum diameter of each bulb in said car was not uniformly of the diameter of 1½ inches or more.

"(c) That the alleged contract as set forth by Complainant was not enforceable against it by reason of the provisions of the Uniform Sales Act.

"(d) That the garlic shipped by the Complainant did in no event comply with the alleged order of Respondent."

The contention of Respondent as to a, b, and d above are overruled. See Finding of Fact No. 6.

† Italic figures in brackets refer to page in 82 F. Supp. 488.—Ed.

The evidence offered at the trial here was not sufficient to change the Findings of Fact made by the Secretary, nor does the evidence justify the finding of additional facts.

The Perishable Agricultural Commodities Act, § 7 (c), as amended, 7 U. S. C. A. § 499g(c) states: "(c) \* \* \* The clerk of court shall immediately forward a copy thereof to the Secretary of Agriculture, who shall forthwith prepare, certify, and file in said court a true copy of the Secretary's decision, findings of fact, conclusions, and order in said case, together with copies of the pleadings upon which the case was heard and submitted to the Secretary. Such suit in the district court shall be a trial de novo and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be prima-facie evidence of the facts therein stated. Appellee shall not be liable for costs in said court if appellee prevails he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of his costs. Such petition and pleadings certified by the Secretary upon which decision was made by him shall upon filing in the district court constitute the pleadings upon which said trial de novo shall proceed subject to any amendment allowed in that court."

Is the contract enforceable under the Pennsylvania Act of Assembly of 1915, P. L. 543, Section 4, as amended, 69 P. S. § 42, which reads as follows: "A contract to sell or a sale of any goods or choses in action of the value of five hundred dollars or upwards shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action so contracted to be sold or sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf."?

[2] The Findings of Fact show that the contract to sell was for goods of a value of \$500 or upwards. The buyer did not accept part of said goods and actually receive the same or give something in earnest to bind the contract, or in part payment and there was no note or memorandum or writing of the contract signed by the party to be charged or his agent. I am therefore of the opinion that the contract in this case is not enforceable by reason of the terms of the aforesaid Act. See *Mason-Heflin Coal Co. v. Currie et al.*, 270 Pa. 221, 113 A. 202; *Title Guaranty & Surety Co. v. Lippincott*, 252 Pa. 112, 97 A. 201.

Let an order for judgment be prepared and submitted in accordance with the foregoing Findings of Fact, Conclusions of Law and this opinion.

# INDEX-DIGEST AND SUBJECT OF AGRICULTURE DECISIONS

JUNE 1950

## AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

### CLASSIFICATION OF MILK

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Verification of shipment records for purpose of.....	2468	699

### EVIDENCE

Record of proceeding showing petitioners' reported classification was intentional and not inadvertent.....	2468	699
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### ORDER NO. 27 (NEW YORK)

#### VERIFICATION OF SHIPMENT RECORDS FOR CLASSIFICATION UNDER

Where petitioners, subject to the New York Milk Order, complained of the milk market administrator's failure to verify, several years ago, petitioners' shipment reports, and if this had been done the records would have shown that the ice cream in question has been shipped outside the city of New York thus entitling it to a lower classification than Class II-B, and that the market administrator, several years later, refused to reaudit and reclassify petitioners' ice cream in a lower classification, the Judicial Officer held that the burden was upon the petitioners to see that the shipment records were examined if they wished a classification dependent upon such records, and, furthermore, the evidence in the record discloses that petitioners' reported classification was intentional and not inadvertent, and, therefore the market administrator did not fail in the duty of verification because his auditors at the time of the audits, a number of years ago, did not seek out the petitioners' shipment records of the ice cream.....

2468 699

### REAUDIT OF SHIPMENT RECORDS

#### CIRCUMSTANCES JUSTIFYING MILK MARKET ADMINISTRATOR'S REFUSAL TO DIRECT

Under the circumstances disclosed in the record the market administrator did not act arbitrarily or unlawfully in refusing to incur the expense necessary to a reaudit to determine, not only to what points Loft shipped the ice cream, but to determine that it never reentered New York.....

2468 699



JUNE 1950

**AGRICULTURAL MARKETING AGREEMENT ACT OF 1937—Continued****VERIFICATION OF REPORTS**

No. Page

**MATTER OF DISCRETION WITH MILK MARKET ADMINISTRATOR**

Since the extent of auditing reports for verification purposes is largely a matter of discretion with the market administrator, it cannot be ruled that for the advantage of the petitioners in this proceeding the market administrator as a matter of law should have investigated further in giving the petitioners a lower classification than that originally reported.....

2468 693

**VERIFICATION OF SHIPMENT RECORDS**

Burden as to.....

2468 699

**PACKERS AND STOCKYARDS ACT, 1921****CEASE AND DESIST**

Violations of act.....

2471 711

**DISMISSAL****COMPLAINT FOR REPARATION**

Complaint for reparation dismissed because of complainant's failure to carry burden of proof as to the weight of an animal shipped by plaintiff from Iowa to Omaha for sale by respondent, a commission merchant engaged in business at the Union Stock Yards, Omaha, Nebraska.....

2470 707

**EVIDENCE**

Failure to carry burden of proof as to weight of animal.....

2470 708

**RATES AND CHARGES****INCREASES IN**

Inasmuch as the parties are agreed and no objection has been filed, respondents' petition is granted and respondents are authorized to file a new and higher rate schedule and are permitted to use the proposed form of the report attached to and filed with the amended petition.....

2469 702

**REGISTRATION****SUSPENSION OF**

Where respondents admitted the violations of the act which the order of inquiry alleged as having been committed by one respondent and the other two respondents did not participate in, having knowledge of, or profit from the violations, the registration of the three respondents as a partnership is suspended for a period of ten months and respondents are ordered to cease and desist, but the suspension is not to apply to or have any effect on a new registration of the two respondents as partners who did not participate in, have knowledge of, or profit from the violations engaged in by the one respondent.....

2471 709

**JUNE 1950**

**PACKERS AND STOCKYARDS ACT, 1921—Continued**

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<b>VIOLATION OF ACT</b>		
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Charging and collecting any rates other than those set out in respondents' tariff on file with the Secretary of Agriculture.....	2471	711
Engaging in unfair and deceptive practices and devices in violation of section 312 (a) of the act.....	2471	711
Failing to render reasonable selling services in violation of section 304 of the act.....	2471	711
Giving false information concerning respondents' operations at the stockyards to representatives of the Secretary of Agriculture charged with responsibility for enforcement of the act.....	2471	711
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Effect of, shipment by buyer where through rate not protected.....	2475	725
<b>ASSIGNMENT OF CLAIM</b>		
<b>RIGHT OF ASSIGNOR TO MAINTAIN SUIT ON</b>		
Where seller, prior to filing with the Department a complaint against buyer, assigned his claim for the purchase price to a bank as security for a loan of lesser amount than the claim, held, that, since the assignment was merely a security transaction which did not divest the assignor of all right, title, and interest in the claim, the assignor retained an equity therein, and may maintain this proceeding on the claim.....	2477	729
<b>COMMISSION MERCHANT</b>		
Consignee of shipment for sale not guarantor of success of undertaking.....	2472	716
<b>CONSIGNMENT SALE</b>		
<b>CONSIGNEE NOT GUARANTOR OF SUCCESS OF UNDERTAKING</b>		
A consignee of a shipment for sale on a commission basis, held, not to be a guarantor of the success of the undertaking where the consignor issued instructions not to break the load unless the consignee believed the contents could be sold for more than freight and other charges.....	2472	713

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**PERISHABLE AGRICULTURAL COMMODITIES ACT, 1936—Continued**

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## APPENDIX A

### Reference to Cumulative Material of Agriculture Decisions (1942-1950)

The following cumulative material will be found in the December issue (No. 12) of Agriculture Decisions, Volumes 1 (1942), 2 (1943), 3 (1944), 4 (1945), 5 (1946), 6 (1947), 7 (1948), and 8 (1949), respectively:

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\*HISTORICAL NOTE.—The Secretary's decision in *In re Thatford Live Poultry, Inc.*, 1 A. D. 435, decided June 3, 1942, overruled prior decisions (Table of Decisions Overruled, 1 A. D. 819) as precedents because of lack of regulation requiring current assets to exceed current liability by at least 25 percent of average weekly purchases. Since that decision, regulation (9 CFR Cum. Supp. 201.14) setting up a standard of financial qualifications has been promulgated. *In re Albert Bree*, 3 A. D. 255 (1944).—Ed.

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\*Certiorari denied by the Supreme Court on December 6, 1948, 335 U. S. 885.—Ed.

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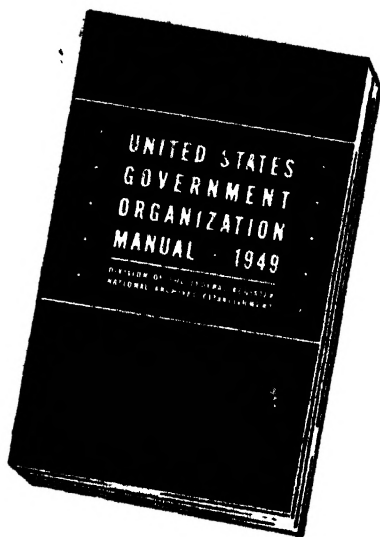
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